Puerto Rico Hotel Association *and* Federacion de Musicos de Puerto Rico, Local 468, American Federation of Musicians, AFL–CIO

San Juan Hotel Corporation, d/b/a El San Juan Hotel and El Conquistador Hotel; The Puerto Rico Hotel Corporation d/b/a The Palace Hotel *and* Federacion de Musicos de Puerto Rico, Local 468, American Federation of Musicians, AFL–CIO

Hilton International Company d/b/a Caribe Hilton Hotel *and* Federacion de Musicos de Puerto Rico, Local 468, American Federation of Musicians, AFL–CIO

Condado Holiday Inn *and* Federacion de Musicos de Puerto Rico, Local 468, American Federation of Musicians, AFL–CIO

Hilton International Company d/b/a La Concha Hotel-Condado Beach Hotel *and* Federacion de Musicos de Puerto Rico, Local 468, American Federation of Musicians, AFL–CIO. Cases 24–CA–4109, 24–CA–4193, 24–CA–4110, 24–CA–4190, 24–CA–4305, and 24–CA–4306

December 1, 1981

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS JENKINS AND HUNTER

On March 16, 1981, Administrative Law Judge James F. Morton issued the attached Decision in this proceeding. Thereafter, Respondents, the General Counsel, and the Charging Party filed exceptions and supporting briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order.

[1] The Charging Party and Respondents Hilton International Company d/b/a Caribe Hilton Hotel, and Hilton International Company d/b/a La Concha Hotel-Condado Beach Hotel have excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] For the reasons stated by the Administrative Law Judge in his Decision, we agree that the regular engagement musicians employed by the Respondent hotels are employees of said hotels within the meaning of Sec. 2(3) of the Act, and that the leaders of such musicians are supervisors within the meaning of Sec. 2(11) of the Act. In this regard we note the following specific incidents of the exercise of control over the musicians by the hotels which were not specifically noted by the Administrative Law Judge: the granting of "ledger privileges" whereby musicians could obtain food and beverages by signing the check and having the cost deducted from their paychecks; the granting of a 25-percent discount on purchases made by musicians; granting a leave of absence to a musician because of illness; imposing deductions on musicians as a result of absences; and paying for advertisements for musical groups currently performing.

[3] Because of the large number of Spanish-speaking persons employed by the Respondent hotels, we hereby direct that the notices to be posted pursuant hereto be posted in both English and Spanish.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondents, Puerto Rico Hotel Association; San Juan Hotel Corporation, d/b/a El San Juan Hotel and El Conquistador Hotel; The Puerto Rico Hotel Corporation d/b/a The Palace Hotel; Hilton International Company d/b/a Caribe Hilton Hotel; Condado Holiday Inn; and Hilton International Company d/b/a La Concha Hotel-Condado Beach Hotel, all of San Juan, Puerto Rico, their officers, agents, successors, and assigns shall take the action set forth in the said recommended Order.[3]

DECISION

JAMES F. MORTON, Administrative Law Judge: These consolidated cases were heard by me between April 21 and May 16, 1980, in San Juan, Puerto Rico.

Based on unfair labor practice charges filed by Federacion de Musicos de Puerto Rico, Local 468, American Federation of Musicians, AFL–CIO (herein called the Union), the amended complaints allege violations of Section 8(a)(1), (3), and (5) of the National Labor Relations Act, as amended (herein called the Act). The principal issue in these cases, precisely stated, is whether the band leaders and the leaders of the smaller groups of musicians who perform in the large hotels in Puerto Rico on a steady engagement basis[1] are supervisors employed by the hotels to direct their musicians-employees or whether these leaders are independent contractors who themselves, and not the hotels, are the employers of these musicians. At the hearing, the parties referred to this issue more concisely as whether the musicians were independent contractors or employees of the hotels. On the premise that the musicians involved have been employees within the meaning of Section 2(3) of the Act of the respective hotels and have been supervised by leaders who are part of the hotels' management structures, the General Counsel set forth in the consolidated complaint the allegations summarized below. All the Respondents challenge the validity of that premise and urge dismissal of the complaint on the ground that none of the musicians are hotel employees. The other issues and the respective positions of the parties thereon are now discussed. The

[1] An engagement is said to be "steady" when done for 5 or more days in 1 week or for 2 or more days in each of 2 or more weeks. Anything less is said to be a "single engagement."

Union's positions throughout are the same as the General Counsel's.

The General Counsel alleges that Respondent, Puerto Rico Hotel Association (herein called the Respondent Association) in the course of bargaining collectively with the Union *vis-a-vis* a renewal contract covering the unit of musicians employed on a steady basis by, *inter alia*, the Caribe Hilton Hotel, the El San Juan Hotel, the El Conquistador Hotel, The Palace Hotel, the Condado Holiday Inn and lastly the La Concha Hotel-Condado Beach Hotel, acted in derogation of the Union's representative status and in violation of Section 8(a)(1) and (5) of the Act by:

> (a) conditioning further collective bargaining at various times, upon the Union's conceding that the musicians in the unit are not hotel employees,
>
> (b) suspending bargaining at another point because the Union had filed unfair labor practice charges with the Board's regional office against the Respondent Association,
>
> (c) changing unilaterally the wording of the recognitional clause of the renewal collective bargaining contract after agreement thereon had been reached, and
>
> (d) encouraging its member hotels to use types of form contracts when employing musicians so as to make it appear that the musicians are not employees of the respective hotels.

The Respondent Association and its member-hotels contend that, even if it were found that the musicians are employees of the hotels, the 8(a)(1) and (5) allegations of the complaint against the Respondent Association should still be dismissed on the ground that:

> (a) the unit of musicians is inappropriate as historically the group negotiations included all the leaders whom General Counsel would exclude as supervisors and as the leaders also actively participated in the Union's internal affairs.
>
> (b) the Union never represented an uncoerced majority of musicians because the Union operated a *de facto* closed shop whereby no musician could perform in any hotel in Puerto Rico unless he first had joined the Union.

The General Counsel further alleges that Respondents El San Juan Hotel, El Conquistador Hotel, and The Palace Hotel, as a single enterprise, violated Section 8(a)(1) and (5) by their untimely withdrawal from the collective bargaining that had been underway between the Respondent Association as their joint bargaining representative and the Union respecting the musicians' unit involved herein and by thereafter refusing to bargain collectively with the Union. These three hotels, by their joint counsel, deny that they ever designated the Respondent Association as their representative for the purpose of collective bargaining and thus aver that they never withdrew in an untimely manner from any negotiations.

The General Counsel also contends that Respondents Caribe Hilton Hotel, Condado Holiday Inn, and La Concha Hotel-Condado Beach Hotel, in violation of Section 8(a)(1) and (5) of the Act, executed contracts with leaders of musicians employed respectively by them, which contracts purport to classify those musician employees as employees solely of the leaders who also are purported therein to be "independent contractors."

The General Counsel separately asserts that one of the Respondent hotels, the Caribe Hilton Hotel, also violated Section 8(a)(1) and (3) of the Act by having, through its supervisor, Band Leader Jose Juan Pinero, discharged Pedro Chiclana, a musician in its employ, because of his activities on behalf of the Union and in order to discourage membership in the Union. In addition, Respondent Caribe Hilton Hotel is alleged to have violated Section 8(a)(1) of the Act by having, through Pinero, (a) threatened musicians to induce them to refrain from supporting the Union, (b) created the impression that their union activities were under surveillance, and (c) engaged in other independent acts, as specified in the consolidated complaint. Respondent Caribe Hilton Hotel avers that Chiclana was never in its employ and seeks dismissal of these allegations on that basis. Alternatively it contends that Pinero's termination of Chiclana's employment was unrelated to any union considerations and that the absence of proof of unlawful discrimination requires dismissal of the allegation involving Section 8(a)(1) and (3). It also seeks dismissal of the allegations of the independent 8(a)(1) violations on the ground that the record evidence does not support any findings of such violations.

I have considered the entire record in these cases,[2] the demeanor of the witnesses at the hearing and the briefs filed by the parties. Based on these considerations, I make the following:

FINDINGS OF FACT

I. THE PARTIES

The Respondent Association was incorporated in 1950 as a nonprofit association to promote the business interests and welfare of hotels in Puerto Rico, to promote legislation on their behalf, to promote tourism, to promulgate matters of interest to persons engaged in the hotel and restaurant business, and to do "any and all

[2] After the hearing had closed and in accordance with the procedure set on the last day of the hearing, counsel for the General Counsel submitted to me a copy of an affidavit sworn to in the course of an earlier case, by the general manager of the El San Juan Hotel. Counsel for the El San Juan Corporation objects to the affidavit being in evidence. That affidavit had at a previous point in the hearing been marked for identification as G.C. Exh. 112 and was offered in evidence then by the General Counsel to insure that the record in this case would contain in its entirety the contents of par. 12 thereof. The General Counsel, however, had immediately thereafter withdrawn G.C. Exh. 112 when it was obvious that the hotel's general manager had just read the whole of that paragraph into the record. I shall sustain the objection as apparently the affidavit is now being offered for a broader purpose than was contemplated when the general manager was available as a witness. G.C. Exh. 112 is being placed in the file containing the rejected exhibits.

Pursuant to the arrangements also established on the last day of the hearing, I shall take administrative notice of secs. 3141 and 3143 of Title 13 of the laws of Puerto Rico and shall receive in evidence copies thereof as G.C. Exh. 138. Further administrative notice will also be taken of secs. 3119 and 3411 and copies thereof are received in evidence as Resp. Assoc. Exh. 60.

things . . . to effect objects." There is no express statement in its articles of incorporation or its bylaws authorizing it to negotiate collective-bargaining agreements for its member hotels.[3] Nevertheless, the General Counsel asserts that the Respondent Association has in fact represented its member hotels in a multiemployer unit in the course of its dealing with the Union over the years as the representative of the musician employees of these hotels. The merits of that contention and the determination as to whether the Respondent Association or any of its member hotels is an employer as defined in Section 2(2) of the Act *vis-a-vis* the musicians involved in these cases must await a consideration of the relevant evidence, set out below. The hotels involved in these cases each have gross annual revenues exceeding $500,000, principally cater to tourists or commercial guests, and purchase items each year which are valued at more than $50,000 and which are delivered to the respective hotels directly from outside Puerto Rico.

The San Juan Hotel Corporation is a corporation organized under the laws of Puerto Rico. It owns and operates the El San Juan Hotel in Carolina, Puerto Rico, and the El Conquistador Hotel in Fajardo, Puerto Rico. The Puerto Rico Hotel Corporation is a corporation formed under the laws of Puerto Rico; it owns and operates The Palace Hotel in Carolina, Puerto Rico. Louis Puro is the principal stockholder of both the San Juan Hotel Corporation and the Puerto Rico Hotel Corporation. These corporations, through Puro, formulate and administer a common labor relations policy and comprise a single business enterprise.

Hilton International Company is a Puerto Rico corporation which owns and operates the Caribe Hilton Hotel in San Juan, Puerto Rico, and also a complex known as the La Concha Hotel-Condado Beach Hotel on Ashford Avenue, San Juan.

Condado Holiday Inn is a corporation organized under the laws of Puerto Rico and it owns and operates a hotel under its corporate name on Ashford Avenue in San Juan.

The Union was founded in 1938 to advance the interests of the professional musicians in Puerto Rico. It affiliated with the International Federation of Musicians, AFL–CIO, in 1951. Respondents challenge its status as a labor organization within the definition of Section 2(5) of the Act based on their view that the musicians are not employees of the hotels and also based on the alleged improper involvement into the Union's internal affairs by the leaders. That issue is discussed and resolved, *infra.*

[3] A nonprofit organization known as the Metropolitan Hotel Association of Puerto Rico, Inc., was formed in 1960 to foster the best interests of its member hotels (which include the Caribe Hilton, Condado Holiday Inn, and apparently all the other large hotels in Puerto Rico) and "to serve as collective bargaining agent" for its members "with all local unions and groups of employees." The Metropolitan Hotel Association has negotiated contracts for its member hotels involving classifications, e.g., culinary workers, as to which there is no dispute concerning employee status.

II. THE ALLEGED UNLAWFUL REFUSALS TO BARGAIN

A. *The Class AA Hotels and Their Use of Musicians*

As of the date of the hearing the Respondent Association had about 28 member hotels of which about 9 had gambling casinos. Those 9 have been referred to in the record in this case at various times as Class AA hotels. The General Counsel alleges that the Class AA hotels have bargained collectively through the Respondent Association with the Union. Six of those Class AA hotels are named in the caption above—the Caribe Hilton, El San Juan, El Conquistador, Palace, Condado Holiday Inn, and La Concha-Condado Beach Hotels. The other three Class AA hotels, Dupont Plaza, Cerromar, and Dorado Beach, had been part of this proceeding but they have been severed as parties.

The responsibility for providing food, beverages, and entertainment in the nightclub rooms and lounges of the Class AA hotels belongs to the food and beverage managers of the respective hotels. Each such club room or lounge is directly supervised by a maitre d'. Some hotels refer to the maitre d' as the room manager or the floor manager. In a typical large nightclub room, the maitre d' is assisted by head waiters who in turn oversee the work of the waiters and busboys in that room. The maitre d' also must insure that musical entertainment is provided in his room as required by the contract between the hotel and the musical group engaged to perform there. The maitre d' is responsible for maintaining the ambiance of the room and for insuring that the customers there are promptly and properly served and entertained. In the typical clubroom, an orchestra directed by its leader and comprised of himself and nine other musicians plays soft music as background during the dinner hour. After dinner, a star performer—usually a well-known singer from the mainland United States—appears to entertain. The 10-piece orchestra, with some modifications discussed below, accompanies the performer using sheet music furnished by that performer and plays in the style required by that performer or the performer's manager. After the performer has completed his show, the 10-piece orchestra plays dance music. The maitre d' does not select the music or the musicians and does not monitor their individual performances. Instead, the leader of the group, who is also at times termed the conductor or the director, is the one who directs the musicians, decides the tempo of the music, and the instruments to be played. The maitre d' can ask the leader to lower the volume of the music if, in the judgment of the maitre d', the orchestra is playing too loud and such requests are routinely honored.[4] The matter as to volume surfaces normally during the dinner hour when sometimes patrons have difficulty conversing when the background music is played too loud. The maitre d' can stop the music in order to speed up the service of food and can also send the musicians home before normal quitting time in those situations where virtually all the patrons have left the room. There are also occasions when the start of

[4] A leader testified that he always chooses to honor such requests. He had been asked on cross-examination whether he was free to honor or reject such requests.

the show by the star performer may be delayed in order to accommodate a late arriving group of patrons. This could occur when a cruise ship is late in arriving and a large party on that ship is expected in the room. In such an instance, the food and beverage manager will notify the leader that the opening of the show is being delayed and the orchestra continues to play background music until the show is ready to begin. Musicians are compensated in accordance with the contract between the Respondent Association and the Union for any overtime hours they work. Their normal workweek consists of a 6-day, 28-hour week.

The Class AA hotels also have cocktail lounges each under the direction of a maitre d'. There, groups of two or three or sometimes more musicians play. Some of the Class AA hotels also engage musicians to play at a poolside lounge during the daytime. The contracts between the Union and the Respondent Association require Class AA hotels to have a minimum number of musicians as specified therein; e.g., their 1975–78 agreement provided that the Caribe Hilton and five other hotels of comparable size shall each "employ a minimum of (18) eighteen musicians during the entire year." This "guaranteed group" included leaders.

B. *The Contractual Arrangements Between the Hotels and the Leaders*

Up until the end of the strike on April 30, 1979, as discussed *infra*, all of the local musicians in Puerto Rico, including leaders, were members of the Union. All other musicians are generally referred to as "travelers" and, except for the five members of the Pat Mills group discussed below, they have been members of sister AFM locals.

The hotels in Puerto Rico routinely used a variation of the printed AFM Form B contract which has blanks to be filled in. In practice in Puerto Rico, those forms have not been filled out meticulously but usually with just enough data to satisfy the signatories; e.g., the group's name, the total amount of their weekly compensation, the date the engagement begins, and sometimes the room where the group is to play.

The total weekly compensation has been referred to at times in the record in this case as "lump sum." That sum is not the total amount of the contract as the term of the contract is for all practical purposes indefinite. In addition, the weekly total does not include compensation for overtime hours worked by the musicians each week or other extra compensation. The total weekly compensation in most cases is calculated according to the formula set out in the contract between the Respondent Association and the Union. This requires that each musician shall be paid a minimum salary for the normal 6-day workweek. That minimum is termed "scale." The leader of each group receives twice the minimum salary or "double scale." Assuming "scale" is $200 and a group is comprised of a quartet, the total weekly compensation excluding overtime and other extras would be $1,000 dollars. The leader of the quartet gets double the scale or $400 and each of the three musicians, called sidemen, receive $200. On occasion the hotels and the musicians will use the services of a booking agent. In those situations, the booking agents' commissions, usually 10 percent, are added on to the total compensation to be paid to the musicians; those commissions are paid by the hotel, not the musical groups.

More recently, certain hotels have been using "personal services" contracts or contracts different in form from those that had been used in past. The General Counsel alleges that the use of those "personal services contracts" or variations thereof is unlawful insofar as they purport to identify the leader as an independent contractor or assert that the musicians are not employees of the hotels. The hotels now using those new form contracts are the Caribe Hilton, the Condado Holiday Inn, the El San Juan, El Conquistador, and The Palace.

C. *Administrative and Other Policies of the Hotels Towards Musicians*

The contracts between the Respondent Association and the Union, discussed in more detail *infra*, have required the Class AA hotels to deduct from the gross weekly earnings of each musician performing at the respective hotels social security taxes, unemployment taxes, workers' compensation contributions, and also income taxes for Puerto Rico. Musicians have routinely filed unemployment claims when out of work in which they have named the Class AA hotels as their employers since the hotels have made the employer contributions on their behalf to the Commonwealth of Puerto Rico.

The contracts between the Respondent Association and the Union also require the hotels to provide free meals to the musicians. The musicians use ID cards furnished to them by the hotels to gain entrance to the employees' cafeterias and for other purposes; e.g., use of employee parking facilities.

A memorandum of understanding signed by representatives of the Respondent Association and the Union on April 30, 1979, states that the hotels provide administrative services to assist the band leaders as the leaders do not have the means or the personnel to undertake the task of deducting and transmitting, *inter alia*, social security taxes. As noted herein, some of the hotels have in 1979 and 1980 attempted to have the leaders make the payments of workers' compensation premiums directly to the Commonwealth for their respective groups.

The hotels, as required by the provisions of the contracts between the Respondent Association and the Union and by virtue of the laws of the Commonwealth of Puerto Rico, are required to furnish the musicians with paid holidays, paid vacations, and sick leave pay.

The hotels have extensive personnel procedures applicable to individuals whose employment status is not in dispute; e.g., maids, porters, and maintenance employees. These employees fill out job application forms, undergo orientation training, are issued employee manuals and copies of rules and regulations governing their employ, punch timecards, and follow detailed grievance procedures. All the foregoing procedures are not generally applicable to musicians performing at the hotels. Further, a musician who is unable to perform due to sickness is expected to furnish a competent replacement. In that regard, the Union's president testified that he has occa-

sionally filled in as a replacement. The hotel pays the regular musician not the replacement. It appears that musicians have made arrangements among themselves to "cover" each other in emergencies.

The Class AA hotels use different internal accounting procedures. Some, such as the El San Juan, charge the weekly disbursements made to the musicians to accounts-payable ledgers while other hotels record such contributions as part of their employee payroll accounts. For budgetary purposes also these moneys are assessed against the sums allocated for the operating cost of the room where the musicians perform or against the overall dining/entertainment budget. One of the witnesses called by the Respondent Association testified that the music presented by the hotels is part of the overall entertainment package that the Class AA hotels provide for guests and that the hotels make decisions as to what restrictions are to be put on the musicians' movements. Another witness called by the Respondent Association stated in this regard that some hotels impose restrictions on the use by musicians of the public areas of the hotels and that most hotels discourage the use by musicians of casinos and bars as the musicians are "on a duty state . . . what they [are] employed for."

A considerable part of the record in this case pertains to the functions performed by the musicians in the respective hotels over the years. The significant testimony thereon is set down below for each hotel:

1. Condado Holiday Inn

The general manager of the Condado Holiday Inn testified that he frequently meets with the band leaders on his own to discuss market trends and to discuss the responses furnished by guests on questionnaires they have completed. The general manager also testified that the two principal areas of concern he has discussed with the band leaders are lulls in the music and complaints that the music is too loud.

One of the General Counsel's witnesses testified that he had been hired by a group leader at this hotel in 1977 to play piano. In 1979 he was asked by the hotel's food and beverage manager to take over that group. He took over the group as leader and hired another musician. That group played at this hotel until March 1980. While playing under the former leader, he earned "scale" and was also given, by his former leader, an extra $20 a week to compensate him for special musical arrangements he prepared for the group. He has used the ID card given him by the hotel not only to collect his weekly pay check but also to get employee discounts. That card has a notation on it that it is the property of the hotel.

The Respondent Association called the hotel's director of personnel to describe at length procedures followed in hiring through its personnel department employees whose status is not disputed; e.g., maids. His testimony indicated that the details of the hiring procedure, orientation, steps, etc., as set out above are applicable. Such employees must furnish health and good conduct certificates; such certificates are not required to be furnished by musicians. The personnel director further testified that ID cards are issued to construction contractors, subcontractors who are engaged to perform refurbishing work in the hotel, and concessionairies or stores located in the hotel.

One of the General Counsel's witnesses, Angel Pena, testified that he has been a member of the Union for over 35 years and has for many of those years led a 15-piece orchestra known as Lito Pena and his Pan American Orchestra. That orchestra performed in the single engagement field, e.g., at a private party, and has also performed on television. In 1976, Pena contracted with the hotel to lead a 10-piece orchestra on a steady engagement basis in its large dining room. Of the 15 musicians in the Pan American Orchestra, he retained only 6. The 10-piece orchestra, during the time it played at the hotel, was known simply as the Lito Pena and His Orchestra. Pena testified that it was necessary for him to change the whole style and character of his music in order to accommodate the mood of the room in the hotel in which his group played. Thus, while his 15-piece Pan American Orchestra played vibrant Latin-American music, his 10-piece hotel orchestra played soft dinner-dance music and accompanied star performers on sheet music provided by those performers in the manner required by those performers. Pena testified that the style of the music played by his 15-piece Pan American group and that played by his 10-piece hotel orchestra were diametrically opposed as he had to adjust his own style to "the needs" of the hotel. During the years he played at the Condado Holiday Inn, he always complied with the requests of the maitre d' to provide special music to please a guest. Pena testified that on one occasion he objected to the fact that one of the star performers had required him to use a particular individual as the drummer of his 10-piece group. Pena stated that he found that individual's performance unacceptable but the complaints he made thereon went unheeded and he was required to retain that drummer as part of the 10-piece orchestra.

In the off season for tourists, Pena has had to reduce his 10-piece group to 8 musicians; he laid off 2 of the musicians and recalled them when the next tourist season began, in December. He and all his musicians, while performing at the Condado Holiday Inn, received salaries in excess of the minimum scale provided for in the Association-Union contract. Whenever a star performer required additional musicians, the hotel sent Pena a memorandum to that effect; Pena then obtained the necessary extra musicians whose salaries were paid by the hotel and were not deducted from the weekly sum stated in Pena's contract with the hotel.

The Union's president testified that all 10-piece hotel orchestras sound identical and they all play the same type dinner-dance music. One of the leaders called by the Respondent Association as a witness, Jose Juan Pinero, testified that his group plays the same style whether in the hotel or elsewhere.

As of the date of the hearing, there were four quartets playing at the lounges in the Condado Holiday Inn. Three of these groups had been there about 3 years; the fourth had been there 3 months. The leaders of two of those groups had, sometime after April 30, 1979, and pursuant to the hotel's request, obtained employer-numbers from the Commonwealth of Puerto Rico's tax

office. One of those leaders now receives a disbursement weekly from the hotel and issues his own checks to the musicians in his group while remitting withholding taxes and other moneys deducted from their gross earnings to the appropriate tax authorities. Apparently, however, the hotel still makes contributions on behalf of all musicians in the hotel to the pension fund established pursuant to the Union-Respondent Association contract.

The hotels use records kept and furnished by the leaders to calculate, *inter alia*, overtime earnings of the musicians in each group. In that regard, the General Counsel placed in evidence a document with the heading, "Interoffice Correspondence" on the letterhead of the Condado Holiday Inn. That document contained instructions directing leaders to submit written notice of overtime earnings due so that delays in payroll processing would be avoided.

The general manager of the Condado Holiday Inn testified that he once resolved a dispute between a leader of a musical group at his hotel and the casino manager there. He talked with these two persons and with hotel security employees to find out what the problems between those two individuals were. He determined that it was essentially a personality clash and he testified he was successful in smoothing out the differences between those two individuals so that he did not lose the services of either. He testified further that a similar situation had occurred previously between the leader of that musical group and with the hotel's food and beverage manager and that problem had surfaced when the group leader, to the annoyance of that manager, began to sit out the last musical set instead of singing as scheduled. The general manager apparently was successful in persuading that group leader to perform throughout the last musical set.

2. Caribe Hilton Hotel

Roberto Lugo, vice president of Respondent Hilton International Company, d/b/a Caribe Hilton Hotel, engages the musical groups who have performed on a more or less permanent basis at this hotel. In doing so, Lugo has dealt with Felix Alegria, a booking agent. Alegria's commissions have been paid by the Caribe Hilton and have been calculated as a percentage of the total earnings of the musicians in each of the groups engaged. The commissions are added on to the contract between the hotel and the group leader. One of those groups had been led for many years by Miguel Miranda. At one point, Miranda had hired a fourth trumpet player in place of a vocalist and had taken it upon himself to leave the bandstand before the last set was finished. Alegria then advised Miranda that the Caribe Hilton management found that the fourth trumpet player was not needed, that he was to be replaced by a singer, that Miranda was to remain on the bandstand during the hours scheduled, and that he was to comply strictly with the schedule set by the hotel except when the maitre d' ordered him to cease playing. Miranda was further advised that the hotel's management wanted Miranda to supervise the musicians and to be present at all rehearsals.

Another group Lugo engaged through Alegria has been led by Jose Juan Pinero. On December 4, 1979, an official of the hotel wrote Pinero, who then held the "honorary title" of musical director for the hotel, on "interoffice correspondence" to make "a concerted effort to appreciably reduce the volume of [his] music" and that the hotel will "make periodic checks to ascertain improvement." One musician in this group testified he was instructed by Pinero to discontinue the use of amplification equipment as the hotel's management was dissatisfied with the volume and quality of the sound it produced. Pinero stated in his testimony that he ordered the musician to discontinue the use of that equipment on his own.

Testimony was adduced by the General Counsel that, on one occasion, Pinero left for vacation but the remainder of the group continued to play in his absence and that there was no change in the overall presentation. Incidentally, it appears that Pinero has approved vacation requests for members in his group but must obtain the approval of the hotel's general manager before taking his own vacation.

Several years ago, a musician brought a civil action against the Caribe Hilton for damages pertaining to a personal injury he allegedly suffered as a result of the hotel's negligence. In contesting that suit, the attorney for the hotel provided by the insurance company which insured the hotel against the suit prepared an affidavit which was signed by a hotel official. That affidavit, used as a defense in that suit, related that the plaintiff musician, as a hotel employee, was covered by the workers' compensation act and that he was injured "in the course of his employment" with the hotel. The hotel's comptroller at that time testified that, pursuant to the guidance of the attorney furnished by the insurance company, he stated in his affidavit that he, the comptroller, was fully in power to supervise, direct, and control the services provided by plaintiff musician as well as the means and the details connected with the rendering of musical services. The General Counsel adduced other testimony to the effect that one of the musicians in Pinero's group was told by the hotel's maitre d' that, as a hotel employee, he was to abide by the hotel's rules governing his right to bring guests on to the hotel premises. On another occasion, the maitre d' instructed that musician to see to it that the rear curtain did not remain open during the dinner hour.

The General Counsel adduced testimony to the effect that, on one occasion, the Caribe Hilton hotel had a problem with one musician in the 10-piece orchestra of the hotel and the hotel thus instructed the leader to replace the individual forthwith. It appears however that that individual was not let go immediately.

It is undisputed that the specific rules and regulations governing porters, maids, and all other such employees are not applicable to the musicians at the Caribe Hilton, that the musicians were paid by the checks drawn by the hotel using computerized payroll operations, and that the earnings of the musicians are charged for cost-analyses purposes to those departments—food beverages and casino—responsible for the entertainment of guests.

3. La Concha Hotel—Condado Beach Hotel

The General Counsel placed in evidence copies of 16 interoffice memorandums by this hotel's food and beverage manager and by other staff officials which are addressed to leaders of musical groups performing there, or to accounting department heads concerning those musical groups. Typical of these memorandums was a memorandum of May 3, 1977, by the food and service manager to three separate musical groups advising them that "[C]ommencing Friday, May 6, 1977, please comply with the following schedule at Mi Sitio lounge." The memorandum then notified one group that it will play on Wednesday through Friday 5 p.m. to 9:30 p.m. and that it will have "Tuesday off"; another group was scheduled to play on Tuesdays from 9:30 p.m. to 2 a.m., from Wednesday to Sunday from 10 p.m. to 2:30 a.m. and that it would have "Monday off." Other memorandums reflected that one group's hours were being reduced by 2 hours because of a "lack of business" and that another group was notified that there was a change in the rooms in which it would play and in their "work schedule" as reflected therein. On another occasion, a musical group was advised that its services would be required on an overtime basis for 1-1/2 hours at a cocktail party 8 days hence; the hotel's comptroller was simultaneously instructed to remunerate the group accordingly.

The Respondent Association developed testimony from the hotel's executive assistant manager who had been promoted to that post from the position of food and beverage manager that he did not screen musicians for hiring or impose on them their style of playing and that he does not direct them in any of the technical aspects of their musical performances. The Respondent Association also called as its witness a dancer, Marcello Palacios, who stated that he heads a group of six dancers who perform at the hotel and that he also pays three musicians who accompany his dancers. Palacios testified on cross-examination that, for the first 4 months, the overall group of 10 performed at the hotel beginning in December 1977, he paid all 10. However, from early 1978 and until the week preceding the hearing in this case, the hotel had paid these musicians directly. In rebuttal, the General Counsel's witness, Jose Torres, testified that he was the leader of the group of musicians who played as part of that Flamenco dance group and that the hotel's general manager had, on one occasion, told him that Palacios had no authority to "dismiss him" but that only the hotel's manager could do so. The hotel on April 24, 1980, advised Torres that his services would no longer be needed as of May 10, 1980, because of a change in the dance program and as the hotel "would not contract anymore musicians for that presentation."

4. El San Juan Hotel

When the strike began in 1979 and for over 10 years previously, the El San Juan Hotel had a group of 10 musicians playing at its Tropicana Club Room. Eduado Gerena testified for the General Counsel that he was hired as a first saxophonist in December 1972 by Anselmo Sacacas, the leader then of that orchestra. In 1976, Sacacas retired and he was replaced as leader of the Tropicana Club band by Jesus Caunedo. The rest of the orchestra was unchanged except that Caunedo hired a pianist as a replacement for Sacacas who had been the pianist. Another musician testified that he had joined that group at this hotel in 1962 as a trumpet player and that Sacacas was the leader for about 15 years. A third musician, also a trumpet player, joined the group in 1966 and has, in recent years, replaced Caunedo as leader whenever Caunedo took a vacation. He stated that, throughout the years he performed with this group at the hotel, there was no essential change in the group's performance.

In common parlance, a large group that plays in the main entertainment room of a Class AA hotel, such as the El San Juan, is sometimes referred to as the "house band."

Leaders at the El San Juan maintain records of the overtime hours worked by members of their respective groups and also as to which members are entitled to additional compensation by reason of their having played more than one instrument during a performance; i.e., pay for "doubling." The hotel's general manager testified that he has to trust these reports of these leaders. Counsel for Respondent El San Juan developed testimony that the contract between the hotel and the group leader contained a "lump sum" amount of money. This figure was the total weekly cost to the hotel of the regular salaries of the members of a group and of the agent's commission fee. It was not the total contractual sum as the length of the contract was for all practical purposes indefinite and it did not include "doubling" costs or overtime costs or moneys paid to extra musicians hired by the leader at the direction of the hotel. In that regard, the testimony is clear that, on occasion, it was necessary to augment the usual 10-piece band with extra musicians as required by a star attraction. The leader hired the extra musicians but their salaries were paid by the hotel which also deducted therefrom the usual taxes. It appears that here, also, the hotel relied on the leader's judgment inselecting the musicians and in setting the gross weekly earnings of the extra musicians so engaged.

The General Counsel proffered other testimony and exhibits to establish that the hotel's management issued memorandums to a leader whereby he was instructed to advise the musicians in his group that they are not to place their instruments against the walls of the hotel and that they are not to go into the kitchen to get coffee but are to use the employee cafeteria instead. The leader of the group and also the hotel's maitre d' informed the musicians that they are not to "warm up" in the dining area but that they should tune their instruments in the room provided for them in the hotel. Gerena testified that his group was "frequently" told by the maitre d' to lower the volume of the music to obtain a subdued sound.

The General Counsel also called the hotel's general manager as a witness. He testified that he had signed an affidavit submitted during the investigation of the underlying unfair labor practice charge in this case and that his affidavit related that the hotel "had 15 regular employee musicians who are paid directly by the hotel . . . 13 of whom performed at the Tropicana Club room and

2 performed at the Right Knight room." Respondent El San Juan Hotel called its president, its vice president for finance, its general manager, its personnel director, and also accounting supervisors as witnesses. They testified that the only instruction given the maitre d' as far as the musicians are concerned is to make sure that a musical group performs according to the contract between the leader and the hotel, that each musical group is paid a lump sum which is charged to accounts payable and not to payroll, that the hotel's personnel department does not maintain any personnel file for any musician appearing at the hotel whereas it does maintain such files for maids and all of its other regular employees and that the musicians do not have to comply with regulations established for the hotel's regular employees, e.g., those requiring employees to punch time cards. Its data processing manager, when asked a preliminary question respecting the way "sidemen," i.e., the musicians, were paid, stated that they "get paid like the rest of the employees."

5. Other Class AA hotels

The complaints in these consolidated cases identify the Respondent Association and the six Class AA hotels discussed above as the actual Respondents. Testimony was adduced at the hearing respecting the operations of other Class AA hotels *vis-a-vis* the musicians in order to throw further light on the employee versus independent contractor issue and as such evidence pertains to other issues; e.g., the appropriateness of the unit.

The food and service manager of the Dupont Plaza Hotel, a Class AA hotel, testified that he selects musical groups by evaluating whether their style fits in with the ambiance of the room to which he assigns the group. He prepares the working schedules for all musical groups of that hotel. Each group normally performs as per the hours set in the contracts between the Respondent Association and the Union; i.e., on a 6-day, 28-hour week basis. The food and service manager at the Dupont Plaza assigns these groups to perform in designated rooms or lounges. On one occasion, a leader of a group in the Parado 30 lounge used a female trumpet player who in the judgment of the food and service manager did not dress appropriately for that lounge and who, in his judgment, should be replaced by a saxophone player. He spoke directly to the trumpet player about improving her appearance and advised the leader that he had 30 days to improve the group's performance. When the trumpet player's performance did not improve, the group resigned. The food and service manager approves all vacation requests made by musicians performing at the Dupont Plaza. In 1979, members of one musical group asked to take their vacations all at the same time; this would necessitate the hotel's engaging a new group to substitute for them. Their request was denied and instead they were required to take their vacations on an individual basis with each member having to furnish a substitute for himself during the period he was away. On February 29, 1980, the food and service manager issued a memorandum setting forth "rules and regulations" for musicians; these included instructions that the musicians list their repertoire which should be updated periodically, that the musicians must not consume liquor "on premises while working," that they should follow the instructions of the lounge manager and inform him of all changes, lateness, new equipment, etc. One of the musical groups played for over 4 years in one of the Dupont Plaza lounges before the food and service manager shifted that group to perform at another lounge.

A predecessor Class AA hotel, the Hyatt Puerto Rico, issued nine rules in 1973 governing the conduct of its musicians—one of which provided for "immediate dismissal for . . . intoxication."

Another hotel, the Holiday Inn at Isla Verda, had completed in March 1977, a questionnaire sent in by a bank to verify "the employment" of the musician named therein who was seeking a loan. In responding to the questionnaire the hotel's personnel manager noted that prospects for that musician's continued employment at the hotel were good. He testified that he based this answer on the fact that the term of the musicians contract was indefinite. In 1978, the personnel manager of that hotel wrote a letter on behalf of a musician in which he referred to the musician as an employee who works for the hotel. The testimony of the Isla Verda's hotel personnel manager was to the effect that a group of six musicians had played there for 7 years and that their leader is paid on a "lump sum" pursuant to his request. It was not made clear whether that leader received an advance on his contract or payment of the total of the respective weekly gross earnings of the musicians in his group or payment for the total of their respective weekly net earnings; i.e., after income, social security, and other taxes had been deducted by the hotel.

The General Counsel called a witness who testified that, in 1979, he had played in an orchestra in a Class AA hotel, the Cerromar. While there, the musicians in that orchestra had changed their uniform attire from a black jacket to rust colored jacket pursuant to the request of the hotel's manager and that the hotel paid for those new "uniforms." On one occasion, the maitre d' of the room in which the orchestra played restricted the musicians from smoking while near the bandstand.

A leader called by the General Counsel testified that his group had been playing at the Dorado Beach Hotel for 3 years, that the hotel's food and beverage manager prepares the schedules as to hours and locations which are followed by his group, that the maitre d' of the room in which his group plays has told them, at various times, to play softer, and that the maitre d' "might" let them go home early if the lounge is "empty."

D. *History of the Contract Negotiations Between the Union and the Respondent Association*

In September 1961, Abraham Pena, who was president of the Union from 1961 to 1977, approached the then president of the Respondent Association and requested that negotiations for a collective-bargaining agreement covering the musicians who work in hotels in Puerto Rico which had gambling casinos should begin. His proposal was accepted. Pena had obtained from other AFM locals copies of agreements they had so that he could borrow some of the language from those agreements in the course of his negotiating meetings with the Respond-

ent Association. The first such meetings took place in 1961. They were attended by representatives from each of the hotels plus four or five lawyers as their respective counsel. Agreement was reached and the agreement was apparently reduced to writing; however, neither the original of the 1961 agreement nor a copy of it is now in existence.

A new round of negotiations took place in 1964. By then three new hotels with casinos (Ponce de Leon, Sheridan, and the Americana) had opened. Pena testified that the representatives of the Respondent Association made it clear that it was representing in those negotiations all the hotels which had casinos. Another 3-year agreement was reached on December 19, 1964, to be effective from December 1, 1964, to November 30, 1967. Copies of schedules A and B referred to therein were not located; it appears that they were similar to schedules A and B annexed to the 1967–70 contract, discussed in detail below. The 1964–67 contract contained a recognition clause which stated that "the hotels recognized the [Union] as the exclusive collective bargaining representatives of all musicians employed by the hotels." There were 13 hotels[5] referred to therein as "employers of musicians."

A copy of the written contract for the period 1967–70 was received in evidence. It recites that it is the collective-bargaining agreement between the Union and the Respondent Association, bargaining for all its members listed therein; i.e., Caribe Hilton, Puerto Rico Hilton, San Jeronimo Hilton, La Concha, Condado Beach, Americana, El Flamboyan, El San Juan, Dorado Beach, Conquistador, Dorado Hilton, Miramar Hilton, and Ponce International. The agreement provided that it was to be applicable "to the classifications of employees listed in . . . attached . . . Schedule (A) and also to conductors, featured instrumental musicians and orchestras employed within the premises of the hotel whose services are rendered in connection with entertainment and dancing, under the supervision of the hotel's executives managing its facilities," all of whom were referred to therein collectively as "musicians." Schedule A annexed to that agreement contained "wage scales, hours of employment and working conditions" for the steady engagement of musicians. By the terms of the 1967–70 agreement the hotels recognized the Union as the exclusive bargaining representative of all musicians within the hotels. This language is different from the language of the recognition clause in the previous contract. The then president of the Respondent Association testified that he proposed the change as he did not want the musicians to be characterized therein as employees of the hotels. He stated that the Union's president, Pena, did not care which way the contract read, apparently because the change did not in Pena's view, interfere with his ability to represent the musicians. Other relevant provisions of that 1967–70 contract required (a) the hotels to make appropriate deductions in payments of social security taxes and unemployment contributions to the pertinent government agencies, (b) the hotels to keep a minimum number of local musicians under contract as set out in schedule B therein, (c) that the Union's constitution and bylaws and those of its International were incorporated into the agreement to be extent permitted by law, and (d) that the agreement shall be in effect from December 1, 1967–November 30, 1971. The agreement was signed by the respective presidents of the Union and of the Respondent Association; officers of each of the hotels signed copies of the agreement to verify that they "ratified" it. Schedule A, annexed to that contract, provided *inter alia*, that nothing therein shall prohibit "any" (AFM) members from contracting for a higher price, that members must receive at least 20 minutes rest per hour, that an orchestra's day off may not be changed without the Union's consent, that musicians must be paid for rehearsals called by the hotels, that a musician who plays more than one instrument in an orchestra shall receive additional payment therefor (this is termed a doubling charge), that the musicians shall be served hot meals by the hotel and shall receive vacation pay as specified therein, that each hotel shall make contributions to the AFM pension welfare fund and that each hotel shall provide an air-conditioned room for use by musicians during intermissions. The minimum wage scale in the 1967 contract provided that a musician in the first year would receive $114 for a 6-day week consisting of 28 hours of performing, that the leader of the musical group would receive double that amount, that overtime would be paid at the rate of $6 an hour and rehearsals at the rate of $4.05 an hour. Each year thereafter under the contract, the weekly minimum was raised $6 so that in 1971 a musician received a minimum of $132 for a week.

In 1967, a disagreement arose respecting the application of the vacation clause in the agreement. On behalf of the Union, Pena wrote a letter to the hotels indicating that they must schedule vacations for each group of musicians so that the whole group would be off during the same period and that the hotels were not to schedule vacations for musicians on an individual basis. The president then of the Respondent Association, Roberto Lugo, wrote Pena that he was writing on behalf of all hotels and objected to the attempt by the Union to interfere with a matter "obviously . . . within the scope of the management prerogative" and to the Union's effort to unilaterally amend the agreed-upon contract language. Lugo further related that he had told the Union that because of their "operational needs," hotels desired to "retain the flexibility to grant vacations to musicians as they see fit." Lugo concluded his letter to the Union by stating that the Respondent Association considered Pena's letter to the hotels as "void."

Aside from few areas of minor disagreements such as that pertaining to the schedule of vacations, the relations between the Union and the Respondent Association until most recently were characterized by witnesses for the General Counsel and also for the Respondent Association as harmonious.

On December 15, 1971, a renewal contract from December 1971 to November 20, 1975, was signed by the Union and the Respondent Association. The form and

[5] Caribe Hilton, El San Juan, La Concha, Condado Beach, Americana of San Juan, San Jeronimo Hilton, Puerto Rico Sheridan, El Convento, El Flamboyan, Dorado Beach, Dorado Hilton, Miramar Hilton, and Ponce International.

contents of that contract closely parallel the prior agreements; "the minimum wage" scale as of the last year of the 1971–75 contract was $202 for each musician for the standard 6-day, 28-hour workweek. Another 3-year contract for the period December 1, 1975, to November 30, 1978, was reached on January 27, 1976. The law firm which represented the Respondent Association at the hearing made its first appearance as its representative when it participated in the bargaining that gave rise to that contract. The format and contents were substantially the same as those of the prior contracts except for the minimum wage rates. The member hotels as listed therein were the Americana, Caribe Hilton, Condado Holiday Inn, El San Juan, Hyatt Puerto Rico, Puerto Rico Sheridan, Cerromar, Dorado Beach, and El Conquistador. In this contract, the musicians received an additional holiday—San Juan Bautista Day Eve. The scale for musicians in 1978 was $238. That 1975–78 agreement stated that the hotels retain the sole authority to change orchestra personnel in case of misconduct.

A new contract was signed in 1979. There is a dispute, *inter alia*, as to whether that signed contract reflects accurately the terms actually agreed upon in the negotiations. Nevertheless the signed contract effective by its terms from April 1979 for a 3-year period closely tracts prior agreements. The current contract is captioned "Agreement" and not "Collective Bargaining Agreement" as were the prior contracts; "wage rates" are now termed "compensation scales." The current contract no longer simply states that the hotels shall make the appropriate deductions (from the earnings of the musicians) and remit the required payments to the pertinent government agencies as before. Instead it provides that the hotels are now doing these things "on behalf of the band conductors." The current contract contains a grievance-arbitration clause. Schedules A and B annexed thereto are similar in format to the schedules annexed to the earlier agreements. For example, both provide for a 20-minute rest each hour for the musicians. The doubling charge has been increased to $5; another holiday was added as was a sick leave clause, termed an "incentive clause." The "scale" for musicians was increased to $248 and will be $282 in 1981.

E. *Background to the 1979 Negotiations*

In the 1960's, the number of Class AA hotels in Puerto Rico grew and reached a climax around 1970. In the 1970's, some of these Class AA hotels closed, others were taken over by an agency of the Commonwealth of Puerto Rico, and others were consolidated. Still others were sold to new management. Other changes were made. Thus, Condado Holiday Inn no longer imported highly paid entertainers to attract guests but found it more productive to provide a more informal atmosphere in its entertainment functions. It has done away with its 10-piece orchestra and now has numerous musical groups playing in its rooms in an effort to attract a stable local following. The El San Juan Hotel still uses headliners from the mainland as attractions but the accompaniment for those entertainers is now taped. The El San Juan no longer uses the standard 10-piece orchestra.

By 1977, union membership had numbered about 2,700; however, only about 125 of these worked in the Class AA hotels. Of the Union's overall membership, only 25 percent performed on a full-time basis, that is, in symphony orchestras, on a single-engagement basis, or in hotels. The great majority of the Union's members perform on a part-time basis. All professional musicians in Puerto Rico had been until sometime in 1979 members of the Union for one or all of the following reasons: (a) it was the accepted wisdom that a performer had to belong to the Union in order to work, (b) it was necessary in order to promote the status of professional musicians' attempts to upgrade their profession, and (c) union membership was essential to enhance the status of the Puerto Rican musician especially in relation to the professional musician coming from the mainland. In actual practice, it appears that no one gave much thought to the reason for joining the Union. It seems that, if a musician were accepted by his peers as a professional, he was readily admitted to union membership and was thus assured of being paid "scale" whenever he played.

In the course of the hearing, the parties alluded regularly to the "Pat Mills" case. That case is discussed in detail below. It appears that it was the result of that case that the Union, on advice of its International's counsel, decided to press in the course of the most recent contract negotiations to have the local musicians declared to be employees of the hotels and that this declaration was to be expressly incorporated into the contract.

A brief look at the Pat Mills case will help put those negotiations in better perspective. Based on a secondary boycott charge filed by Pat Mills doing business as Pat Mills and Company, a complaint had issued against the Union. The hearing was held in December 1978. The Board issued its decision on December 5, 1979.[6] The decision indicates that in July 1978 the El San Juan Hotel contracted, through a booking agent in New York City, to bring down to perform in the El San Juan Hotel Pat Mills and Company for a 4-week engagement. That group consisted of Pat Mills, her husband, and five other musicians and a lighting operator and was nonunion. At the hearing in the instant case, the General Counsel referred to the Pat Mills group as "travelers" who are not covered by the collective-bargaining agreement between the Union and the Respondent Association. At the hearing in the Pat Mills case, the General Counsel contended that Pat Mills and her husband were self-employed persons under Section 2(6) and (7) and Section 8 of the Act. Based on the uncontroverted testimony of Pat Mills at the hearing in that case that she and her husband were individual proprietors with an office in West Nyack, New York, and that they provide musical services outside the State of New York in excess of $50,000 a year, they were found to be self-employed. The Union had argued in that case that its threat to strike the El San Juan Hotel was aimed at a lawful object, that is, the preservation of unit work. Administrative Law Judge Plaine held, however, that its real object was to force Pat Mills and others in her company to join the Union's

[6] 246 NLRB 129 (1980).

sister local in New York City and that the Union's threat thus violated the Act as alleged.

For reasons not clear but apparently related to some of the issues in the Pat Mills case, the Union decided to seek separate negotiations in December 1978 with the Class AA hotels in Puerto Rico and also to obtain express language in the collective-bargaining agreement that the local musicians were employees of the hotels, subject to a union-security clause, entitled to representation by stewards and also to receive sick leave pay. As discussed below, the Pat Mills case has a bearing on the language used in the recognition clause of the 1979–81 contract.

F. *The Most Recent Negotiations*

The Union's president, Angel Nater, testified that in September 1978 he told the executive director, Miguel Domenech, of the Respondent Association that the Union wanted to negotiate individually with the hotels involved in this case and that Domenech responded in effect that the hotels wanted the Respondent Association to act as their joint representative. It appears that Nater himself conducted the Union's negotiations directly with an advisory group in the background. The Union's advisory group consisted of three individuals, one of whom was Juan Pinero, who also had been the Union's vice president. Pinero, as discussed below in another section, is alleged in this case to be a supervisor employed by the Caribe Hilton Hotel.

On September 28, 1978, Domenech wrote Nater to state that the contract "which established working conditions for the contracting of musicians" will expire on November 30, 1978, and therein he asked Nater to set forth the Union's demands, an obvious invitation to the Union to begin negotiations for a renewal contract. Domenech wrote the Union on October 17 to note that he had not received a written reply to his September 28 letter and he stated therein that, instead, Nater had left two telephone messages which appeared to be in conflict with each other—in one, Nater reportedly said that the Union would negotiate with each hotel individually and, in the later call, Nater reportedly indicated that the Union would forward its demands to Respondent Association on or about October 15, 1978. Nater responded by letter of October 19, and enclosed with it a list of what the parties termed the Union's "non economic" demands. On November 3, Domenech wrote Nater asking that the Union's "economic demands" be made as soon as possible. On October 2, representatives from hotels belonging to the Respondent Association had met and drafted a "Mutual aid and protection agreement" which recited that these hotels "desired to continue engaging in collective bargaining negotiations with the Union on a multiemployer basis." The draft further recites that the Respondent Association's board of directors was empowered to "establish a labor relations policy" for the musicians. That mutual pact referred to the possibility of a "whipsaw strike against one of the employers" and to a lockout response thereto.

On November 10, 1978, the Union set forth its economic and noneconomic demands in Nater's letter to Domenech. By letter of November 17, Domenech replied that the noneconomic demands were completely unacceptable; he stated that the members of Respondent Association "do not employ musicians," that Respondent Association has always rejected the Union's proposals "to have the hotels incorporate musicians into their regular work force," and that the musicians are "employees of leaders." Domenech noted that the Respondent Association and the Union have always discussed "certain minimum wage" scalee for musicians to work at the "member hotels." Domenech also observed in that letter that the Union's proposals respecting those minimum (wage) scales were "to say the least unrealistic," and he suggested that the Union "present realistic proposals." Also, on November 17, the mutual aid protection agreement referred to above was signed *inter alia* by representatives of the Caribe Hilton Hotel, Condado Holiday Inn, LaConcha-Condado Beach, and by Sam Sweitzer for El San Juan Hotel.

On November 27, 1978, Sam Sweitzer, the president of El San Juan Hotel, wrote the Union stating that he was writing on behalf of El San Juan, the El Conquistador, and the Palace Hotels. These hotels are owned by one individual, Louis Puro. Sweitzer stated in that letter that these hotels deny the statement in the "collective bargaining agreement" for the period December 1, 1975, to November 30, 1978 (which covered the musicians at those three hotels), that the services of those musicians are "under the supervision of the hotels" and its executive managing its facilities. Sweitzer wrote that these three hotels were not employers of the musicians and that they "refused to recognize the Union or to bargain with it for any type of labor contract covering musicians who perform in these hotels." He concluded his letter with the statement that the El San Juan, El Conquistador, and the Palace Hotel have advised the Respondent Association of their dissent from certain parts of the Respondent Association's letter to the Union dated November 17, 1978.

The first negotiation meeting for a renewal contract for 1979 took place on November 28, 1978, and was attended by the Union's president, Nater, and by the Respondent Association's president, Juan Santoni, its executive director, and two members of the law firm representing the Respondent Association. Nater testified that the Respondent Association's representatives told him then that the Union's demands included matters that implied that the parties were negotiating a collective-bargaining agreement. Nater testified that he thereupon responded that was exactly what the Respondent Association and the Union had been doing since 1961. Nater, in his testimony, characterized the Respondent Association's position as analogous to that of a "half pregnant" woman in that, from Nater's viewpoint, the Respondent Association was engaged in collective bargaining while, at the same time, denying it. The Respondent Association's representatives stated at those negotiations that it was amenable to Nater's suggestion that the National Labor Relations Board resolve their controversy as to whether the hotels employ musicians. The Respondent Association also observed that it is aware of the increased cost of living and that its position in adjusting

the earnings of the musicians should not be in variance with adjustments that "may be directly agreed upon by the different hotels with the orchestras leaders performing under contract in their facilities." (There was no testimony that any of the member hotels had direct discussions with the leaders thereon from then and until the Union and the Respondent Association ultimately reached a new agreement, as discussed below.)

The Union then filed an unfair labor practice charge with Region 24 of the Board. On December 7, its president, Nater, wrote Domenech and enclosed with his letter the Union's new contract proposals. The enclosed documents omitted reference to a "collective bargaining agreement" and simply referred to this "agreement." The proposals therein recited that they shall be applicable to the classification of employees listed in the "wage scale, hours of employment and working conditions" attached thereto as schedule A and to those who are "employed within the premises of the hotel whose services are rendered into the connection with the entertainment and dancing, all of whom will be [therein] collectively referred to as "musicians"—and that "all such musicians shall be in the bargaining unit covered by this agreement." Among the provisions sought by the Union as set forth in the proposed agreement were a union-shop clause, a grievance and arbitration clause, a no-lockout clause, a clause for free parking facilities, additional paid holidays, 12 days sick leave each year, a clause providing for payment of a Christmas bonus, coverage for family medical expenses, a no-subcontracting-out clause, and provisions for an increase in the weekly wage scale to $353 in the last of a 3-year contract.

Nater met with the Respondent Association's representatives and its legal counsel on December 8, 1978. Nater testified at the hearing that, to get the negotiations going then, he signed a letter prepared by the Respondent Association whereby Nater acknowledged that he has "reached the moral conviction that the position assumed by (the Respondent Associaton) in relation to the issue of whether or not the musicians are employees of the hotels is reasonable" and that the Union was willing not to insist on "integrating the musicians as part of the [hotel] labor force" provided agreement could be reached on a commercial compulsory arbitration clause in the contract in order to protect the musicians adequately.

In late December 1978, when the 1975–78 agreement was scheduled to expire, the Union agreed in a meeting with representatives for the Respondent Association, which was also attended by officials from the Puerto Rican Conciliation and Arbitration Bureau, to continue bargaining without calling a strike.

On December 31, 1978, Nater and other union representatives met with Louis Puro at his office in the El San Juan Hotel and informed him in effect that the November 27 letter the Union received from Sam Sweitzer on behalf of the El San Juan Hotel, the El Conquistador, and the Palace Hotel was an untimely attempt to avoid associationwide bargaining. Nater said that Puro told him that he was willing to "deal with the hotel association" and that, on Puro's general assurance that things would be all right, the Union decided not to go on strike at the El San Juan hotel.

Nater testified that on January 8, 1979, he was advised by the Respondent Association's attorneys that the Union had to withdraw its unfair labor practice charge before negotiations could resume and that the Respondent Association continued to assert that the hotels were not the employers of the musicians. Nater informed them that the hotels were in fact the employers of the musicians; he testified that, nevertheless and in order to be able to negotiate, he accepted the Respondent Association's demands.

On January 15, when the Union and the Respondent Association met again, Nater advised the Respondent Association that he had not yet withdrawn the unfair labor practice charge. He was then given a letter by the Respondent Association and was requested to sign it. He did so. The letter recited that he had agreed on January 8 that musicians are not employees of the hotels and that consequently the Union agreed to withdraw the unfair labor practice charge it had filed.

On January 22, 1979, the Respondent Association presented Nater with another document and requested that he sign that one. He did so. That document recited that the hotels had made deductions including social security taxes from the compensation paid musicians as an administrative service to band leaders who do not have the means and personnel to undertake those tasks.

The next meeting was held on January 23. Present for the Association were its president, Juan Santoni, its executive director, Miguel Domenech, its attorney, Milagro Soto, and two hotel officials, Roberto Lugo and Arne Orenstein. For the Union were its president, Nater, its treasurer, and a trustee. The Respondent Association presented its draft of the agreement. Nater and Santoni on behalf of the respective parties initialed a number of clauses on that draft to indicate their agreement as to those clauses. The recognition clause as so approved read "the hotels recognize the Union as the exclusive representative of all musicians performing within the hotel." (The General Counsel contends that subsequently the Respondent Association unilaterally inserted the letters "AFM" before the word "musicians" in that clause to suggest that the Union had agreed to represent only union members; the Respondent Association asserts that the clause was in fact later modified by agreement.) On February 15, the Union and the Respondent Association met. The parties reached agreement respecting a "fondo incentive" whereby the hotels would contribute to a fund a certain amount of money each month for musicians to compensate them for days lost because of illness and to provide an incentive for a musician not to feign illness and to perform although not perfectly well. Under this clause, each musician would receive at the end of each year the balance of the money credited to him in that fund. The Union asserts that the hotel in essence granted their demand for sick leave pay. The parties reached agreement on a number of other items including increased earnings, or other type pay raises, on the number of vacation days and they also agreed that travelers shall not be part of the contract. Roberto Lugo

signed a memorandum on behalf of the Respondent Association on February 15, as did Nater for the Union, which sets out those areas of agreement. No reference is made in that memorandum as to the insertion of the letters "AFM" in the recognition clause of the contract.

Counsel for the Respondent Association, Maria Soto, explained how those letters came to be included in the final draft of the agreement. She testified that she attended the February 15 meeting and that, after Lugo and Nater signed the memorandum of agreement, she had a discussion with Nater respecting problem areas in obtaining ratification from the board of directors of the Respondent Association. The notes she had made while at that meeting were then received in evidence. These reflect that Nater indicated that "all musicians was not accepted but AFM was in order to prevent a repetition of the Pat Mills case." The Respondent Association's executive director, Domenech, was unable to recall any of the particulars of the conversation between Soto and Nater; he testified that there was general acceptance of the language changes. Earlier in the hearing, Attorney Soto had observed that the Respondent Association did not make the reference to "AFM" musicians to change the makeup of the group covered by the contract as at that time all of the local musicians were members of the Union.

It is undisputed that both the members of the Respondent Association and the Union had to ratify the agreement before it would go into effect.

G. *The Union's Ratification Meeting*

Although the Union had over 3,000 members, only about 150 worked in the hotels, a number of whom were leaders. On February 19, 1979, about 100 of the members who performed in the hotels attended a union meeting to vote on whether to ratify or reject the agreement reached between Respondent Association and the Union on February 15. Objections were voiced at the union meeting based on the failure of the agreement to guarantee that a 10-piece orchestra would continue to perform at the Condado Holiday Inn, and the fact that the provisions of the contract were not retroactive to the effective date of the contract and to the amount of the increases provided for in the weekly earnings of the musicians. The contract was rejected. A strike vote was proposed. Jose Juan Pinero, a band leader at the Caribe Hilton Hotel whom the General Counsel contends is a supervisor there, was present at the meeting and voiced objections to certain members being allowed to participate in the voting. Another individual, James Stevens, also alleged to have been an agent of a member hotel, objected to a strike vote. The membership nevertheless voted to strike, which began on February 19. It lasted until April 20, 1979, when the respective presidents of the Respondent Association and the Union apparently resolved their differences as discussed below.

H. *The 1979–81 Contract*

In the middle of April, Nater called the Respondent Association's office and asked to meet with its president, Juan Santoni. This call led to a meeting between Nater and Santoni on April 18 in Santoni's apartment. Santoni informed Nater that all the Respondent Association's prior offers had been withdrawn. Nater observed that there were three matters that had created the impasse, referring to the (1) guarantees that the hotels would have specified minimum numbers of employees, (2) salaries, and (3) retroactivity of the contract. Santoni said that the hotels had been able to function by having "hired nonunion members and foreign musicians." Nevertheless, Santoni said that he would try to get the Respondent Association's board of directors to accept the Union's proposals respecting the guaranteed number of musicians to be used by the Class AA hotels. They discussed the retroactivity issue and other matters. When the discussion ended, Santoni arranged a meeting with the Respondent Association's board of directors to review the points he and Nater had discussed.

On April 19, Nater came to the offices of the attorneys for the Respondent Association. After discussing the provisions of the incentive fund clause, i.e., that relating to benefits for sick leave, used and unused, and discussing the clause guaranteeing the use of the minimum number of musicians, Nater and Santoni signed "an agreement in principle" adopting the agreements reached on February 15 and on seven further points, including those pertaining to the guaranteed number of musicians, salary scales, and retroactivity. There was no reference therein to the language of the recognition clause. On April 27, Nater received from the Respondent Association a final draft of the agreement dated April 30, 1979, to be effective as of April 19, 1979, for a 3-year period. The recognition clause therein stated that "the hotels recognized the Union as the exclusive representative of all AFM musicians performing within the hotels." Nater apparently took no notice then of the letters AFM. He stated that he did notice then a discrepancy with respect to the amount of the contributions for the sick leave provisions. He called those figures to the attention of the Respondent Association's representatives and these were corrected. On April 30, he and Santoni signed the contract and the strike ended.

On August 7, 1979, a meeting of various members of the Respondent Association was held respecting questions as to whether the contractual provisions relating to their guaranteeing the use of a specified minimum number of musicians required them to have a minimum number of AFM musicians or whether the minimum number pertained to both union and nonunion musicians. (It appears that, at that time, a number of musicians had been dropped from union membership.) The Respondent Association's counsel advised its member hotels then that the minimum guarantee applied to all musicians, regardless of union membership; he further advised the hotels that they cannot establish a distinction between musicians that belong to the Union and those who did not and that the hotels "for all purposes do not even inquire whether the musicians are or are not Union musicians."

I. *Further Discussion Between the Union and the Owner of the El San Juan, El Conquistador, and Palace Hotels*

Louis Puro owns these three hotels and actively participates in their operations. He has controlled the El San Juan Hotel for 19 years, the El Conquistador for 15 years, and the Palace Hotel for 2 years.

The Union's president, Nater, testified that on April 30, 1979, he met with Puro and Samuel Sweitzer, president of the El San Juan Hotel. Nater said that Sweitzer had told him that he had read the proposals sent him by the attorney for the Respondent Association and that he believed they were acceptable. According to Nater, Puro then said that he did not know about that but, after further discussion, Puro agreed to guarantee that the El San Juan and the Palace would jointly use a minimum of 18 musicians. Nater related that he and Puro discussed the employment of nine musicians, a matter now the subject of a separate civil action in Puerto Rico.

J. *Use of Personal Services Contracts*

It is undisputed that the Respondent Association has recommended that its member hotels use a new form of contract to be signed by them with their leaders which states that the leader is the employer of the musicians not the hotels. It is also clear that the Condado Holiday Inn, the Caribe Hilton, El San Juan, El Conquistador, and the Palace hotels have, since the execution of the last agreement, been using that form of contract or one similar to it.[7]

III. ANALYSIS OF EVIDENCE AS TO ALLEGED REFUSALS TO BARGAIN

A. *The Employee vs. Independent Contractor Issue*

The parties in their respective briefs have discussed the guidelines I am to use in deciding whether or not the steady engagement musicians in Class AA hotels are employees as defined in the Act or are excluded thereform as independent contractors. It will be helpful to state those guidelines. Thus, the common law agency test must be applied.[8] Under this test, an employer-employee relationship exists where the person for whom the services are performed reserves the right to control not only the ends to be achieved but also the means to be used to achieve such ends.[9] All of the facts must be analyzed in applying the test.[10] Each case is determined on its own facts.[11] It is the right, not the exercise of control, that is important.[12] The test applies to individuals who may be supervisors as well as to those who may be employees.[13] While the test may be simple to state, it is not easy to apply.[14]

Respective counsel for the Respondents considered and discussed the relevant factors set out in Restatement of Agency 2d, §220, in applying the common law agency test to the facts in the instant case. This approach seems to me to be a sound one as it permits a detailed consideration of those factors in conjunction with the comments provided in the Restatement. My evaluation of the evidence in the context of those factors, as discussed below, does not accord with the arguments they urge, however.

I am aware that the applicable common law agency test was developed in tort cases to decide issues as to the liability of a master where a negligent act was committed by an individual, other than one of his regular servants, whom he had used in performing a service for him. On that premise, it would seem that my determination in this case should be based on the very same concept. That is, a steady engagement musician in a Class AA hotel would be an employee covered by the Act if that hotel were held to be liable for a negligent act by that musician during a performance at the hotel and which caused injury to a patron; conversely, if the hotel were exonerated from liability for such negligence by the musician, the musician would be an independent contractor.[15] That may be an awkward way to view the issue but I believe that it does put the specific issue in its proper legal perspective. That is not to say, however, that my determination must be identical to the results of such a tort action. The Restatement of Agency, 2d, observes that where the inference to be drawn from the relevant facts (as to whether or not an independent contractor or a master-servant relationship exists) is clear, the court should decide the matter as purely a legal issue; if the inference to be drawn is not so clear, the issue should be submitted to the jury for a factual determination pursuant to appropriate instructions. In the instant case, I do not think it can be said as a matter of law that the inference to be drawn from the testimony respecting the status of the musicians as employees or as independent contractors is clear. Rather, and as is evident from the discussion below, I think that reasonable men may differ thereon. Consequently, the issue involves a factual determination.[16] In deliberating on the question, I have considered

[7] The Caribe Hilton has used the services of a booking agent, Jimmy Stevens, to handle the bookkeeping and the disbursement of paychecks to musicians. Thus, it pays Stevens each week a lump sum of the total of the moneys due the musicians and gives him its records as to the hours they worked, including overtime. The payment to Stevens also includes a commission for himself. Stevens then draws checks on his own account to pay the musicians each week and transmits taxes and other required deductions to the appropriate authorities.

[8] *N.L.R.B.* v. *United Insurance Company of America*, 390 U.S. 254 (1968). In that case, the Court discussed its holding in *N.L.R.B.* v. *Hearst Publications, Inc.*, 322 U.S. 111 (1944), where it had approved the Board's holding that the Act had been intended to cover "employees in the conventional as well as the legal sense . . ." as "the primary consideration" was whether the purpose of the Act would be effectuated by providing tothe individuals whose status was in dispute (i.e., newsboys alleged to be independent contractors) the protection guaranteed by the Act. The Court further observed that since the issuance of the decision in that case, the *Hearst* case, the Act itself was amended to reflect the intent of Congress that the common law agency test would control in determining whether individuals are employees or independent contractors.

[9] *Deaton Truck Lines, Inc.*, 143 NLRB 1372 (1963).

[10] *Yellow Cab Company*, 229 NLRB 1329, 1332 (1977).

[11] *Georgia Pacific Corporation*, 249 NLRB 1388 (1980).

[12] *Nevada Resort Association; Summa Corporation, d/b/a Castaways Hotel, et al.*, 250 NLRB 626 (1980).

[13] *Deaton Truck Lines, Inc., supra.*

[14] *N.L.R.B.* v. *Hearst Publication, supra.*

[15] The same rationale would apply to a leader of a musical group at a Class AA hotel. The issue then would be whether he was a supervisory employee or an independent contractor. Cf. *Deaton Truck Lines, supra.*

[16] In *N.L.R.B.* v. *United Insurance Co. of America, et al.*, 390 U.S. 254 (1968), the Court viewed the employee vs. independent contractor issue as essentially factual and on that basis affirmed the Board's holding.

the factors viewed by the Restatement as appropriate for that purpose. These are now discussed according to the headings used in the Restatement:

1. Extent of control

The Respondents stress the fact that none of the hotels' top or middle management officials—the general manager, the food and beverage manager, and so on—have the technical competence to direct a band with respect to tempo and other musical attributes. The General Counsel and the Charging Party places considerable weight on the testimony that the managers of the Class AA hotels insist on a particular dinner-dance style of music to blend in with the character that these hotels strive to achieve for purposes of attracting patronage and on other testimony that the hotels possess and exercise significant control over the musicians in scheduling their workhours and overtime, in changing work locations, in regulating the volume of the music, and in the conduct and appearance of the musicians.

The comment set out in the Restatement states that the right of control needed to establish the relation of master and servant may be very attenuated, that in some cases there may be an understanding that an employer shall not exercise control, citing as an example the status of a full-time cook as a servant, although it is understood that the employer will exercise no control over the cooking. On that basis and because of the nature of the evidence presented, I give more weight to the areas relied on by the General Counsel. The hotel management sets the ambiance of the room and, through subordinates, including the respective maitre d's, the preparation and service of food and beverages is blended with the decor of the room and the entertainment provided therein to achieve a unified object—to provide a delightful evening for its guests. The testimony of a witness called by the Respondent Association is worthy of note in that regard. Jimmy Stevens, a bandleader-booking agent-entrepreneur with many years of experience in Puerto Rico, stated the maitre d' of a room where music is provided to accompany food and beverage service is "the boss of his room [and] coordinates the elements that go towards a successful presentation of food and entertainment [and he] has full operational authority within his specific room." Testimony of other witnesses which I credit further establishes that the maitre d' can and does direct leaders to lower the volume of the music if he considers it too loud to permit guests to talk while eating. The maitre d' can stop the music to speed up service, he can instruct the leader to have the musical group work overtime, and he occasionally has the band play a particular style of music to appeal to a party of guests; e.g., he will call for Mexican music should he feel that it will please guests from that country. One of the very experienced leaders was asked on cross-examination whether he could choose not to follow the maitre d's request for him to play a certain type of music. He answered with a smile and the statement that he always chose to play as the maitre d' had requested. I have no doubt from the overall testimony that the bandleaders are delighted to receive such requests, that they frequently select certain songs to appeal to an ethnic group dining at one of the tables in the room, and that they invite guests to suggest the songs to be played. I also have no doubt that they would never consider refusing to comply with a maitre d's wishes.

The record is replete in this case with examples of the control exercised by a Class AA hotel *vis-a-vis* the musicians. It schedules the days and hours of work of the musicians, assigns them to the rooms in which they perform, approves the vacation requests of the leaders and not infrequently also those of the sidemen in their groups, restricts them from using the gambling casino between musical sets, directs them to rehearse with featured performers and schedules their hours of rehearsal, prohibits them from leaving their musical instruments against a wall, requires them to wear appropriate attire to fit in with the ambiance of the room, reduces the number of musicians in a group where feasible in its judgment, insists on a leader remaining on the bandstand to accept applause, and so on. The hotels control the style of the music as they require soft background music during dinner, livelier dancing music afterwards, followed by playing sheet music for featured performers, and in the late hours more dance music. One leader testified that he had a 15-piece orchestra which played vibrant Latin-American music on club dates; i.e., a one-night concert or the like. When he began as a leader of a band in a Class AA hotel, he kept only six of the musicians and had to hire four others. In addition, he had to modify his musical style so that it became indistinguishable from the style played by all other 10-piece hotel bands in Puerto Rico.

Respondents argue that the contracts between the hotels and the leaders in essence provide for all the foregoing. As I understand it, they are asserting that, because the band is performing in accordance with the contract its leader signed with the hotel, the musicians are contractors whose skills make them independent. That is not all that is to be evaluated. The Restatement clearly indicates that what is being evaluated is the relationship of the parties arising out of their agreement. No one suggests that the master-servant relationship as viewed in modern agency law retains the elements of serfdom out of which the common law principle evolved. It is assumed that the relationship is a consensual one and that the agreement could well be in writing. The matter before me is, as the Restatement indicates, the determination as to the nature of the relationship.

Respecting the element of control, the Respondents point to record testimony that the leaders do the hiring and firing of sidemen in their respective groups, that the musicians do not file the standard employment application forms at the hotels' personnel offices as do individuals seeking jobs as porters, desk clerks, and so on and that musicians are not given orientation training or detailed rules regulating their work duties as are maids, maintenance employees, and the like. That testimony is of relevance on the ultimate issue, as observed below, but the fact that the hotels closely control the work environs of certain classifications does not mean that I must disregard the extent of control hotels possess over the group whose status is in dispute, simply because the control is not of equal magnitude.

Let me close the discussion under this factor by observing that the Class AA hotels do possess considerable control over the details of the work environs of the musicians in this case.

2. Engaged in a distinct occupation

All the parties acknowledge that the musicians performing in the Class AA hotels are highly skilled and are in a clearly distinct occupation. The significance of this factor may not be as great today as it was in the early common law when servants were assigned to unskilled tasks and entrepreneurs performed the skilled work. In that regard, the Restatement notes that modern technological developments are having an impact on agency law. Thus, the Restatement observes that the captain of a ship can disregard the orders of the ship's owner and still the owner will be liable for the captain's negligence in controlling the ship. In view of this, I am inclined to give less weight to the fact that the musicians have a distinct occupation than to the element of control, discussed above.

3. Whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision

The comment provided in the Restatement as to this factor is not, in my view, too helpful in deciding the issue posed in the instant case. The Restatement notes that area custom is a factor and then qualifies that observation by pointing out that skilled employees who resent interference are still servants if regularly employed, referring for example to cooks and gardeners. On the other hand, the Restatement observes that an individual employed for a specific job would not be a servant. It seems to me the emphasis is as much if not more on tenure than area custom.

Insofar as tenure is a consideration hereunder, the testimony discloses that, while the written contracts are for specific periods, they often are renewed and on frequent occasions, for year after year. In effect then the tenure is generally indefinite and often for many years.

4. The skills required

The musicians in this case are highly skilled and it is rare for an official of the hotel to impose his views on a leader respecting the performance of the group although there have been situations where a food and beverage manager has insisted on and obtained changes in the makeup of a group to satisfy his wish for a different musicial style or format.

5. The supplier of the instrumentalities, tools, and workplace

The Restatement comments that the fact that an individual supplies his own tools is some evidence that he is not a servant whereas, if he uses his employer's tools, it is normally understood that he will follow the owner's direction in their use and that indicates that the owner is a master. In the instant case, the musicians furnish their own instruments to a great extent, e.g., the saxophone and other small pieces, but the hotel furnishes the piano and often the sound-amplifying system. The leaders own and use their own sheet music; when performing with a featured star performer, the musicians use sheet music provided by the manager of the star performer.

Respecting the locale of the workplace, the hotels obviously provide the rooms in which the musicians perform. For that matter, the hotels set aside rooms to be used by the musicians during their rest periods. The Restatement, relative to this factor, contains an illustrative example. It states that coal miners who furnish their own helpers and their own explosives, but who are furnished with the larger machines and the means of ingress and egress by the owner of the mine who pays them for each ton of coal mined, are servants of the mine owner. That illustration suggests the analogy that, as the hotels in the instant case furnish the rooms where the musicians play, the piano and the amplification system which comprise the larger pieces of equipment, and the means of ingress and egress and as the hotels pay the musicians on an hourly basis, the musicians are servants within the meaning of the common law agency rules.

6. The length of the engagement

As noted above, the length of an engagement is normally indefinite insofar as the steady engagement musicians are concerned. Some groups have been with the same hotel for many years. It appears too that more than a few of the musicians have worked steadily for many years at one or another of the Class AA hotels in Puerto Rico.

7. Method of payment

Respondents have characterized the method used by the hotels to pay the musicians as "lump sum" payments. The method used is in fact virtually identical to the way an employee is paid. Regular weekly paychecks less the usual deductions are issued. The so-called lump sum figure set out in the Form B contract in essence establishes the regular weekly salary of each group member and does not cover overtime pay or other extras. My concept of a lump sum payment is one in which an owner pays a builder a total amount for a project at its inception or completion or at specific stages and no accounting is kept by the owner as to hours worked by the workers engaged by the builders, their rates of pay, and so on.

About the only area where the method of payments between a hotel and a musician can be said to be analogous to that between an owner-builder, as described above, pertains to the practice in Puerto Rico whereby musicians cover for each other in emergencies. On those occasions, it appears that the hotels and, for that matter, the leaders are not aware of the substitution until a group is ready to perform on a particular night. The hotels keep no record of such substitutes but treat the matter just as if the regular musician had appeared. This exception is a consideration. It also highlights the normal procedures which, *inter alia*, involve a musician showing his ID card at a payroll window each week to collect his paycheck.

The contract between a leader and a hotel occasionally provides the payment of a specified commission to a booking agent. That commission is not deducted from the so-called lump sum for the musicians but is paid by the hotel directly to the booking agent.

Respondents urge that little weight be given to the fact that hotels deduct income tax and other sums from the weekly paychecks of the musicians as it contends that the laws of the Commonwealth of Puerto Rico and the provisions of the collective-bargaining agreements between the Union and the Respondent Association require that such deductions be made. The General Counsel disputes the assertion that Puerto Rican law expressly requires the hotels to make such deductions. On that point, it appears that a leader could obligate himself under Puerto Rican law to deduct such moneys and transmit them to the local tax authorities but he would first have to obtain an "employer" number from the tax officials and follow the requisite regulations not detailed in the record in this case. It is evident, however, that this procedure is not a practical one. The Respondent Association's own proposal during the last negotiations with the Union provided that the hotels would make such deductions on behalf of the leaders because the leaders do not have the facilities to handle those details.

With respect to the argument put forth by Respondents as to the reason why the hotels have made tax and other deductions from the musicians' weekly paychecks, it seems to me that I should accord significant weight to the fact that, for all practical purposes, the hotels are obligated to deduct and transmit such moneys and even more weight to the fact that the hotels have for years obligated themselves to do so under the provisions of the collective-bargaining agreements between the Union and the Respondent Association.

8. Whether the work is a part of the regular business of the employer

Respondents contend in the briefs they filed that the main primary business of the hotels in this case is to furnish lodging, not music. I am not sure that that statement is entirely accurate. The Class AA hotels in Puerto Rico are hardly wayside inns where weary travelers may find rest at night. Their distinguishing feature is that they operate gambling casinos and, in conjunction therewith, appeal to tourists by offering food, beverages, and musical entertainment. In that context, it seems clear that the work performed by the musicians is part of the regular business of the hotels.

9. The belief of the parties

The nature of the negotiations between the Union and the Association for many years in executing collective-bargaining agreements pertaining to wages, hours, and other terms and conditions of employment, the internal operations of the Respondent Association insofar as they pertain to its dealingswith the Union, including the fact that the member hotels entered into a mutual aid and protection pact to guard against whipsaw tactics by the Union, the use of conciliation services by the Respondent Association and the Union; the language used by hotel officials in directing musicians, in contesting civil actions brought by musicians, in responding to inquiries from banks and from local agencies—all these point strongly to a belief by the parties that a master-servant relationship existed. It is true that whenever this belief surfaced, the Respondent Association denied that the hotels were employers of the musicians. Also, the Union's president did sign a statement prepared by the Respondent Association which provided that the parties agreed that the hotels were not employers of musicians.

I think that more weight should be given to their acts rather than to their conclusionary denials or admissions in determining what they actually accepted as to the nature of the relationship of the hotels *vis-a-vis* the musicians.

10. Whether the principal is in business

The Restatement does not provide any comment as to this factor. Presumably, this factor refers to the likelihood that one who is not in a regular business, e.g., an owner of a house, normally enters into contracts with independent contractors as to house maintenance and does not normally hire employees to perform such work. That factor has no bearing on the issue in this case.

11. Other factors

Section 220(2) states that the foregoing 10 factors, among others, are to be considered in resolving the agency issue. In this section I will discuss those aspects of the evidence which do not fall readily under any of the above 10 listed factors.

(a) *Comparison of working conditions*

Respondents note that there are significant differences between the working conditions applicable to the musicians and to individuals whom it concedes to be regular hotel employees; e.g., maids, desk clerks. I suppose that differences must exist in order for the issue in this case to be raised. Voluminous testimony and numerous exhibits in evidence demonstrate these differences, and also a number of similarities in the way the hotels dealt with the musicians and with individuals they view as employees. The differences in great part had to do with personnel procedures in that applicants for jobs as porters filled out personnel forms, and were interviewed and hired by personnel department officials and then were given orientation training, job training and booklets containing rules and regulations; musicians were not given any of these forms or booklets and obviously already had competence in their particular area. The similarities may, however, be entitled to greater weight. Thus, the leaders of musical groups were often the recipients of interoffice memoranda which indicated that they were part of the supervisory structure of the hotels. Also, the records kept by the leaders as to regular hours worked by musicians, overtime hours, and as to "doubling" moneys due are akin to duties traditionally performed by a supervisor. Further the musicians were given ID cards by the hotels, free meals in the employee cafeterias, employee discounts, and so on.

(b) *Use of the Form B contract*

Another miscellaneous area involves the language and use of the Form B contract. The General Counsel stresses the language therein that refers to the hotel as an employer. The record evidence is clear however that the only parts of that form that ever meant anything were the weekly salaries, the starting date of an engagement, and the signature lines.

(c) *The Association's legal status*

The Respondent Association notes that its own articles of incorporation and bylaws contain no provision whereby it is authorized to negotiate collective-bargaining agreements. I am not sure I understand the import of that observation; the doctrine of *ultra vires* is used to prevent corporate acts but not to excuse them. In any event, I attach significant weight to the provisions of the mutual aid pact drafted by the Respondent Association.

(d) *Entrepreneurial risk*

The Restatement, strangely, does not refer to entrepreneurial risk in determining whether one is a servant or an independent contractor. In any event, the musician in the instant case is an hourly wage earner protected by unemployment and disability insurance with provision for sick days and allowances for a vacation. The hotels even assume liability if his musical instrument is stolen from the musician's room. There is virtually no risk of pecuniary loss for a Class AA hotel musician, in the ordinary business sense.

(e) *The "Pat Mills" case*

In a decision issued in 1979, the Board found that the leaders of a musical group that performed at one of the Class AA hotels, the El San Juan, were self-employed persons.[17] That case was referred to by the parties at the hearing before me as the "Pat Mills" case as the name of the musical group in that case consisted of Pat Mills and Peter LaJeunesse, d/b/a Pat Mills and Company. In that case, as discussed above, the Pat Mills group came from New York to put on a show at the El San Juan and were forced to leave by the Union, the Charging Party in the instant case, when it threatened to call a strike among its members performing at the El San Juan hotel. There was no issue raised in that case as to the independent contractor status of the Pat Mills group. The Union admitted that the leaders of that group were self-employed persons. It sought to defend on the ground that its object was purely work preservation; however, it was held that the evidence showed that the Union violated Section 8(b)(4)(ii)(A) and (B) and Section 8(e).

Counsel for Respondent El San Juan stated in his brief, relative to another point, that all musical groups are self-employed whether they perform on a single engagement basis (i.e., one-night shows, also called a club date) or a steady engagement basis (as do the musicians in the Class AA hotels). He observes that a steady engagement is simply an extended club date.

The question that concerned me is whether the General Counsel could contend, as he did successfully in the Pat Mills case, that the musical group there was engaged by the Hotel El San Juan on an independent contractor basis and still argue before me that the regular musical groups are employees. The short answer is that he can as it is settled law that each case turns on its own facts. In that regard, I note that there are some apparent differences between the Pat Mills group and the Puerto Rican musicians involved in the instant case and that, in any event, the independent contractor issue was not litigated in the Pat Mills case.

It is my finding, after weighing all of the relevant facts in this case in the light of the guidelines set out by the Restatement, that there exists an employer-employee relationship between the Class AA hotels and the musicians involved in this case, rather than that of an independent contractor arrangement. The attributes of the status of these musicians *vis-a-vis* the hotels are closely akin to those of individuals who concededly are hotel employees, despite the obvious lack of any real community of interest between the musicians and those employees. Further, the long history of collective bargaining, the significant areas of control possessed and exercised by the hotels over the musicians, the close integration of their work with the hotels' operations and functions, the fact that the musicians run virtually no risk of pecuniary loss, the fact that the leaders of the musical groups perform functions substantially equivalent to a first-line supervisor in charge of a departmental unit of skilled individuals, and the other points noted above—all persuade me that a master-servant relationship exists, as contemplated by the common law rules of agency, between the musicians and the Class AA hotels in this case. In accordance with established principles, the musicians are thus found to be employees as defined in Section 2(3) of the Act and not independent contractors. I further find that the leaders of the musical groups in this case, *inter alia*, responsibly direct the work of the musicians and that they are thus supervisors as defined in Section 2(11) of the Act.

B. *The Appropriate Unit*

There are three matters to be considered in determining the scope of the appropriate unit. The first relates to the General Counsel's contention that three of the Class AA hotels attempted to withdraw from the association, wide unit in an untimely manner; the second involves the claim of the Respondent Association that the leaders' historical inclusion in the unit rendered it inappropriate; the third has to do with defining the overall scope of the unit.

The complaint alleges that the appropriate unit consists of all steady engagement musicians employed by the hotel members of the Respondent Association exclusive of bandleaders and independent contractors. The General Counsel contends that Respondents El San Juan hotel, El Conquistador Hotel, and The Palace Hotel were members of the Association for purposes of bargaining

[17] *Federacion de Musicos de Puerto Rico, Local 468, American Federation of Musicians, AFL-CIO (Pat Mills, d/b/a Pat Mills and Company)*, 246 NLRB 782 (1979).

collectively with the Union and that they sought to withdraw from that unit after negotiations for a renewal contract were well underway. These three Respondents, through counsel, have asserted that they were not members of the Association and hence that they have no obligations as to anyone with respect to the unit alleged in the complaint. The evidence is clear that these hotels are commonly owned and controlled and administer a common labor relations policy. In that regard, their representatives (principally Louis Puro and Sam Schweitzer) have signed contracts negotiated by the Respondent Association and the Union covering steady engagement musicians and had aligned themselves with officials of other Class AA hotels in formulating and implementing a mutual aid and protection pact designed to counter any whipsaw tactics that the Union might attempt. These three hotels made no effort to withdraw from the unit until after the Union had, as requested by the Respondent Association, presented its list of bargaining demands. Moreover, Puro made it clear before the strike began that he would follow the Association's lead and he made it clear too when the strike ended that the contract negotiated with the Association was acceptable to him and he even agreed to the minimum number of musicians his hotels would use. I thus find that, at all times material to this case, Respondents El San Juan, El Conquistador, and The Palace were part of the Associationwide unit for purposes of collective bargaining with the Union.[18] Their refusal to honor the commitments made on their behalf by the Respondent Association constitute unlawful bargaining.[19]

The next consideration involves the fact that for years the bandleaders were part of the recognized unit. Respondents contend that their inclusion compels a finding that the unit is inappropriate. I note that the unit placement of leaders was never an issue in the negotiations. To invalidate the substantial impact of those negotiations now after so many years, especially where it is well settled that the inclusion of supervisors in a unit does not render it inappropriate,[20] would undermine the stability reached in that whole area. Rather, the exclusion now of the leaders is appropriate as either party to the negotiations may opt, at any time, to exclude them without destroying the employee unit itself.[21]

The third matter to be considered pertains to the scope of the unit. In the complaint, it was alleged that the musicians employed by all 34 hotel members of the Respondent Association constitute an appropriate unit. The issue was more closely defined in the course of the hearing as the parties addressed themselves to the specific question as to the musicians employed by the Class AA hotels in Puerto Rico and the related contract negotiations. More specifically the signatory hotels to the mutual aid and protection pact in late 1978 and the participation of the Class AA hotels in negotiating through the Respondent Association establish the scope of the overall unit—all steady engagement musicians employed by the Class AA hotels in Puerto Rico excluding leaders, independent contractors, travelers, and all other employees.

C. *The Union's Majority Status*

The Respondent Association has denied that the Union has represented an uncoerced majority of the unit employees, noting in that regard that the Union had never been certified by the Board as their bargaining representative and that some of the musicians had joined the Union years ago because, in their view, no musician would work with them if they did not join the Union. It appears too that some of these musicians, and others, were of the view that the Union enhanced their status as musicians. Throughout the course of the negotiations in 1979, all the musicians in the unit involved herein were members of the Union. It was not until after the strike was over that some musicians resigned from the Union or were dropped from its membership rolls because of their failure to remain current in their payment of dues to the Union.

I see no basis to conclude that the Union did not represent an uncoerced majority. The evidence is clear that at all material times the Union has been the choice of the majority of the unit musicians. I had some pause by reason of the involvement of supervisory personnel, i.e., the leaders, in union affairs, but it is evident that the unit employees rejected the efforts of the leaders to block a strike. Union membership by leaders does not *per se* impair the Union's majority status.[22]

D. *Alleged Unlawful Conditions Imposed by the Respondent Association as to Continuation or Resumption of Collective Bargaining*

The Respondent Association maintains that it never expressly conditioned bargaining with the Union on its first withdrawing unfair labor practice charges or on its conceding that the musicians are not hotel employees. The Respondent Association nevertheless acknowledges that the status of the musicians as hotel employees was a threshold issue that had, by necessity, to be solved before bargaining could continue. While the Respondent Association's agents may not have stated that view *in haec verba* during the actual negotiations, there is no question that it insisted that the Union in essence must acknowledge that the unit employees were without the protection of the Act before any raise in wages or related matters could be considered or discussed. In view of the finding above that the musicians are employees of the hotels entitled to the protection of the Act, the actions of the Respondent Association and its member hotels in conditioning bargaining as indicated herein constituted unlawful refusals to bargain collectively with the Union.

The Respondent Association, Respondent Caribe Hilton, Respondent Condado Holiday Inn, and Respond-

[18] *Charles D. Bonanno Linen Service, Inc.*, 243 NLRB 1093 (1979); *Retail Associates, Inc.*, 120 NLRB 388, 395 (1958).

[19] *Wm. Chalson & Co., Inc.*, 252 NLRB 25 (1980); *L. B. Priester & Son, Inc.*, 252 NLRB 236 (1980). See also *Teckwal Corp.*, 253 NLRB 187 (1980).

[20] *Florida Power & Light Co.* v. *International Brotherhood of Electrical Workers, Local 641, et al.*, 417 U.S. 790, fn. 3 (1974).

[21] *Federal Compress & Warehouse Company* v. *N.L.R.B.*, 398 F.2d 631 (6th Cir. 1968).

[22] Cf. *Industry Products Company*, 251 NLRB 1380 (1980). See also *Florida Power and Light Co., supra.*

ent El San Juan, El Conquistador, and Palace all promoted the use of various forms of personal service contracts to be signed by the Class AA hotels and leaders of musical groups. In and of themselves those form contracts could not be violative of the Act as they represent, in the context of this case, simply arrangements between employers and their supervisory personnel. What is improper, however, is the acknowledged purpose of those personal service contracts. Their use was promulgated and obviously used and known in the music industry in Puerto Rico in furtherance of the position of the hotels that they are not employers of the musicians performing in the hotels. Simply stated, the personal service contracts were adopted and used to make it clear to all, including the employees themselves, that the hotels would not bargain collectively with the Union respecting the wage rates and other terms of employment of the hotel musicians. In effect, the use of the personal service contracts was but a variation of the method by which these Respondents unlawfully refused to bargain with the Union, as found above.[23] I shall, however, dismiss the allegation that the hotels' use of such personal service contracts constituted unlawful unilateral changes as the subject matter is not one requiring collective bargaining. Insofar as the personal service contracts pertain solely to arrangements among supervisory personnel, the Union would have no right to bargain thereon; insofar as they purport to deny that the musicians are hotel employees, the Union's bargaining cannot change that fact. While it is true as the General Counsel argues that the changes in the methods of paying musicians as contemplated by those personal services contracts constitute unilateral changes as to which bargaining should be required, those changes were but incidental to the basic violation found. The greater encompasses the lesser.

E. *Alleged Unilateral Change in Language of the Recognition Clause*

There was considerable dispute at the hearing as to whether the Respondent Association had unilaterally inserted the letters AFM in the recognition clause of the 1979–81 contract before it was signed. Thus, the Union's president testified that he had never agreed to that insertion and was not aware that those letters had been inserted into the final draft of the contract when he signed it. Counsel for the Respondent Association, Soto, testified that her notes at a negotiating session in February 1979 reflect that the Union's president and the Respondent Association's executive director reached agreement on a number of items which they then initialed and that, sometime later that day, the Union had agreed with the Respondent Association that the Union's contract would not apply to groups such as the Pat Mills group. (It appears that that the Respondent Association's members were concerned that somehow the 1978 contract might enable the Union to do legally what the Board had enjoined it from doing as a result of the Pat Mills case, discussed above.) The Union acknowledges that the contract does not cover such groups as Pat Mills, either because they are "travelers" or "independent contractors" but it maintains still that it never expressly agreed to the insertion of the letters, AFM, in the recognition clause. The Respondent Association notes that in the final drafts of prior contracts minor language insertions have been made to reflect informal understandings. It appears that neither side is contending that the parties agreed that the contract was a members-only ontract.[24]

While the evidence is that the parties did not expressly agree to the insertion of the letters AFM, I find that the evidence is insufficient to establish that the Respondent Association unilaterally changed the agreed-upon contractual language by inserting those letters prior to final signature. The insertion was consistent with the intent of the parties, however informal the agreement was thereon. Similar modifications of minor points have been done before. I am not persuaded that the fact that the Union's president did not, when he signed the final draft of the contract, consciously assent to the use of that insertion, requires a finding that he did not assent to its use. In short, the Union and the Association reached an informal agreement as to the scope of the recognition clause, the Association sometime later made a change to reflect that agreement as has been the practice in the past, and the Union signed the document without objection. That does not add up to an unlawful unilateral change, notwithstanding that, at first blush, the recognition clause could easily be misread to indicate that the parties had signed a members-only contract.

IV. THE ALLEGED DISCRIMINATORY DISCHARGE OF PEDRO CHICLANA BY RESPONDENT CARIBE HILTON AND ALLEGED INDEPENDENT VIOLATIONS OF SECTION 8(A)(1) OF THE ACT

A. *The Relevant Testimony and Related Credibility Resolutions*

1. General background

The General Counsel alleges that the Respondent Caribe Hilton, by its supervisor, Bandleader Jose Juan Pinero, discharged its musician employee, Pedro Chiclana, because of his activities as a member of the Union and interfered with the Section 7 rights of its musician employees by reason of other conduct by Pinero, discussed in more detail below. The Respondent denies that Pinero is a supervisor in its employ and contends that, even if he were, none of his actions were violative of the Act.

Pedro Chiclana began working at the Caribe Hilton hotel on December 20, 1971, as a saxophonist and as a flutist. From about 1973 or 1974, he performed at the Club Caribe in the Caribe Hilton hotel under the leadership of Jose Juan Pinero as part of a group known as Pijuan and his sextet. He had been a member of the

[23] As no evidence was offered that the La Concha-Condado Beach complex used such personal service contracts, the General Counsel's motion, made in its brief, to withdraw the complaint allegation thereon, is granted.

[24] One of the officials of the Respondent Association testified that he had expressed the opinion to other officials of the Association that the letters, AFM, indicated that the contract applied only to musicians who were members of the Union. On advice of counsel, the Association concedes that the contract covers hotel musicians, regardless of union membership.

Union for many years as had Pinero. For that matter, Pinero had been much more active in union affairs than Chiclana had been. Pinero had, for a 2-year period, held the position as vice president of the Union and had also been a member of an advisory council to the Union's president.

2. Alleged independent violations of Section 8(a)(1)

In February 1979, about 100 members of the Union gathered at its meeting hall to vote on contract ratification. The contract was rejected. A strike vote was then scheduled to be taken. Pinero protested and spoke out against the Union's calling a strike. In the absence of any evidence thereon, I assume that Chiclana took no active part one way or the other at that meeting. The strike vote was taken and, as a result, an immediate strike was authorized.

Chiclana testified that, after the strike vote was taken and while he was in the driveway outside the building in which the vote had been taken, Pinero approached him and others who were in the Pijuan sextet. Chiclana testified that Pinero said to them then that he did not want them on the picket line and that they were to meet with him later that evening in the musicians' room in the Caribe Hilton hotel. One of the other members of the Pijuan sextet at that time, Hector Negron, also testified at the hearing. However, he made no reference to such a meeting in the driveway that day. Pinero testified that he never had given any order to Chiclana to refrain from picketing; Pinero did not refer to any meeting of his sextet in the building's driveway, as Chiclana had. Although Pinero's denial is summary in nature and Chiclana's account is detailed, I am not persuaded, especially as Negron failed to corroborate Chiclana's testimony on the point, that the General Counsel has shown affirmatively that Pinero issued an instruction to members of his sextet on the day of the strike vote to refrain from picketing. Pinero's denial is thus credited.

Chiclana further testified that, when he arrived at the Caribe Hilton later that night, there were several pickets outside. He said that one of them recognized him as a member of the Pijuan sextet and pulled him onto the picket line. Chiclana related that, about 20 minutes later, Pinero arrived at the hotel and that, when he saw Chiclana on the picket line, he told Chiclana that he did not want to see him on the picket line. Chiclana further stated that after about 2 hours he noticed that he and a few other musicians were the only ones from the Caribe Hilton who were on the picket line then and that he decided to go into the hotel. He testified that he left the picket line and that, as he entered the musicians' room, he heard Pinero arguing with a union delegate, Chico Rivera, telling Rivera that he, Pinero, did not have to order his musicians to go outside; i.e., join the strike. Chiclana said that the leader of another group performing at the Caribe Hilton, namely, Mario Ortiz, intervened and suggested that everyone should go outside to discuss the matter on the picket line. Chiclana said that most of the musicians went outside to the picket line.

Pinero testified that he had told the union delegate that evening that he was in no hurry to get on the picket line but that later everyone did go out. Pinero said that he too "went out in the picket line" where he observed that one placard referred to him as "rat." Pinero denied ever expressly instructing members of his sextet to refrain from picketing. In view of the confusion respecting the precise sequence of events, the excitement caused by the first strike among musicians in the hotel industry in Puerto Rico and the fact that no witnesses were offered by the General Counsel to corroborate Chiclana's statements that the members of the sextet were ordered by Pinero not to picket, I am not satisfied that the General Counsel has sustained his burden of proving affirmatively that Chiclana's version is more credible than Pinero's denials.[25] In that regard, I note that a union delegate named Rivera testified at the hearing but on a point entirely distinct from any argument with Pinero, as recounted by Chiclana.

During the strike of the hotels' musicians, the Pijuan sextet (with some minor changes, e.g., the singer was replaced) performed at a television studio located adjacent to the Caribe Hilton. Chiclana continued to perform there with the sextet, notwithstanding that during those same months he was doing picketing duty at the hotels. Sometime before the strike ended Pinero resigned from membership in the Union. The sextet, including Chiclana, resumed performing at the Caribe Hilton when the strike ended.

The General Counsel presented three witnesses, including Chiclana, who testified that, at a meeting in the musicians' room at the Caribe Hilton shortly after the strike ended in late April 1979, a union official sought to collect "taxes"; i.e., working dues to be paid to the union. At that meeting, according to these witnesses, Pinero said that he himself had discontinued paying "taxes" to the Union and that he wanted the musicians in his group also to stop paying "taxes." Pinero's testimony was general in nature and in essence was a statement that he never engaged in any action, as alleged in the complaint, that he had interfered with the musicians' right to pay "taxes" to the Union. Pinero acknowledged that there had been a meeting pertaining to the payment of taxes but did not elaborate on it. I credit the accounts of the General Counsel's witnesses as they were substantially consistent and detailed, in contrast to the summary nature of Pinero's version.

3. Chiclana's discharge

During the strike, the Pijuan sextet (with a different singer) began performing as part of an early evening television show. It continued with that show after the strike ended when it resumed playing at the Club Caribe in the Caribe Hilton hotel.

On June 27, 1979, Chiclana arrived at the television studio just prior to the start of the show featuring the Pijuan sextet. While he was chatting in the parking lot with some friends, Pinero drove in and a few minutes later walked by Chiclana and told him abruptly to go inside. Chiclana testified that whenever Pinero is in a

[25] For the same reason, I am unable to credit Chiclana's further testimony that, on the same day of the strike, Pinero saw him on the picket line at the Caribe Hilton and told him to leave. Chiclana testified that, as a result, he moved to a picket line outside another hotel.

mood, such as he was that day, his musicians "can't even breathe" for fear of being made the object of his wrath. In any event, it is undisputed that, soon after the sextet settled down to rehearse prior to the start of the show, a shouting match took place between Pinero and Chiclana. It is not entirely clear to me but I do not think the General Counsel is asserting that Respondent Caribe Hilton prearranged such a confrontation in order to have an excuse to discharge Chiclana. If somehow there is such a contention, I reject it as the event had the hallmark of an unanticipated confrontation between an unusually tense leader and a sideman, somewhat more relaxed in nature until, as unquestionably happened, Pinero ordered him to put on the appropriate attire. At that point, the only question was which one became the more excitable. The parties spent considerable time attempting to show which one of the participants was principally at fault. In my view it makes no difference as the argument was purely personal in nature and had nothing to do with Chiclana's membership in the Union. For that matter, it appears that Chiclana was at that time delinquent in his dues payments to the Union and had not, at that point, been involved in any union activities, other than his having picketed months previously along with many other musicians, including it seems other members of the Pijuan sextet. In any event, Pinero and Chiclana calmed down in time for the start of the TV show. At its conclusion, Pinero walked from the studio to the Caribe Hilton hotel which was nearby and where he composed a letter giving Chiclana 2 weeks' termination notice "in compliance with [Chiclana's] request." He gave this letter to Chiclana later on June 27.

Chiclana took the letter to the Union's office the next day, paid his dues delinquencies, and obtained the assistance of a union official in drafting a response. On that same day, June 28, Chiclana gave Pinero a letter signed by him, Chiclana, which stated that Pinero's letter of June 27 was "completely erroneous."

Pinero read the letter. Chiclana testified that Pinero then told him that the letter was not prepared by Chiclana but was done by the Union and that he (Pinero) assumed that Chiclana had paid his taxes to the Union. Pinero testified that he simply told Chiclana that the Union's secretary had written the letter for him and Chiclana acknowledged that this was true.

On July 5, Pinero advised Chiclana that he was adhering to his decision to terminate Chiclana upon the completion of the 2 weeks' notification period; i.e., July 11. Chiclana testified that Pinero then told him in a loud voice to go look for another job and that he, Chiclana, told Pinero not to raise his voice. Thereupon, according to Chiclana, Pinero put his finger on Chiclana's chest and ordered him to be quiet. Pinero's account of that incident is that he saw Chiclana apparently "bragging" to other musicians and that he then spoke to Chiclana privately to urge him to let things quiet down and "to leave the door open." Pinero testified that Chiclana nevertheless called him vile names and asked him to step outside, apparently to settle the matter by fighting. On July 6, Pinero handed Chiclana a letter which related that he, Pinero, was adhering to his determination to discharge Chiclana as of July 11. The letter noted that "there does not exist any regulation at union level (or elsewhere) that forces" a leader to keep a person who is unable to comply "with the most elementary rules of ethics, discipline etc." The letter ended by Pinero's advising Chiclana that he has by his demeanor and language "ruined all chances of staying with the group."

Chiclana further testified that, upon the completion of the performance at the Club Caribe on July 11, Pinero told him that he was a good musician and that the other musicians wanted Pinero to give him another chance but that it was, in effect, necessary for Pinero to go through with his discharge of Chiclana because this was the "best example" to show that the Union's strike had been a "failure" and that the contract the Union had reached with the Association was also a "failure."

Pinero testified that on Chiclana's last day of employment he told Chiclana that he was sorry about it, that this was a hard lesson for him (Chiclana), and that perhaps some day Chiclana could return to the group when his behavior improved. Pinero said that Chiclana responded by saying he disagreed with Pinero and by assuring Pinero that he would be back to work the next day. (It appears that for several nights thereafter Chiclana did come to the Club Caribe lounge to sit near the sextet but he has not played with it since.)

In his pre-trial affidavit, Pinero related that he had stated that the fact that Chiclana had gone to the Union had created "more antagonism." At the hearing, he stated that this was true.

The General Counsel has failed to persuade me that Chiclana's account of his conversation with Pinero on the last night he worked with the Pijuan sextet was more credible than Pinero's account. It seems unlikely to me that Pinero would first have stated in writing, as he did, that Chiclana had by his behavior toward him (Pinero) ruined forever his chances of continuing with the sextet and then say, in effect, to Chiclana that he would have kept him as part of the group but for the fact that Chiclana had gone to the Union. Pinero's version is consistent with the preceding events. The impact of Pinero's statement that Chiclana's having gone to the Union had created "more antagonism" is discussed below in the following subsection.

It is undisputed that Chiclana was the first musician that Pinero has fired and that, since July 11, 1974, Chiclana has not performed at the Caribe Hilton hotel.

The General Counsel also proffered evidence respecting the status of Pinero as a supervisor for the Caribe Hilton Hotel. In good part, this testimony has been set out above in section III, under the subsection for the Caribe Hilton. In addition, the following data was submitted. In 1978, the hotel's managing director had a meeting of all the hotel's musicians and informed them that Pinero had been promoted to the position of musical director by the hotel's general manager and that refreshments were then served. Pinero testified that this was an honorary title. He received records from the leader of the 10-piece orchestra at that hotel pertaining to hours worked by the musicians in that group and turned those notes in to the hotel's controller for payroll processing. Pinero, according to one musician in his group, instruct-

ed him to stop going to the casino, as did the maitre d' of the room in which they played. On one occasion, Chiclana was given a device by Pinero which, when inserted in the mouthpiece of the saxophone, amplified the sound. According to Chiclana, Pinero directed him to cease using it and told Chiclana that the hotel wanted its use discontinued because it created too loud a sound which was not in keeping with the style of music desired. Pinero testified that the discontinuance of the device was his own decision. Pinero is given free parking space by the hotel; the musicians pay the same fee for parking as do other individuals; e.g., maintenance workers, whom all parties concede are statutory employees.

The Respondent Caribe Hilton offered testimony that Pinero was an independent contractor. Thus, Pinero testified that he arranges his own music and does not use stock arrangements which can be purchased at a music store. He rehearses his group each Saturday and decides what music will be played. He takes his group on cruises and on television assignments and generally takes his vacation from the hotel at the same time he lets his group go on vacation. In that regard, only he, Pinero, seeks approval from the food and beverage manager as to when to take his vacation but the musicians in his group deal only with him, Pinero, and not with the hotel's food and beverage manager. When the sextet vacations, Pinero arranges for a group to substitute for them at the hotel and pays that group himself. Pinero testified that he decides the amounts to be paid. The record does not disclose how long or how frequent are the vacation periods but, presumably, they are taken in accordance with the vacation provisions of the contract between the Respondent Association and the Union.

B. *Analysis as to Alleged Discrimination and Interference*

1. The alleged discriminatory discharge of Chiclana

The credited testimony establishes that on June 27, 1979, Chiclana and Pinero got into a heated argument which was unrelated to the Union and which resulted in Pinero's giving Chiclana notice that his employment would be terminated 2 weeks hence. In that interval, they had more arguments of a personal nature. Pinero made it clear that he viewed Chiclana's behavior as outrageous and discharged Chiclana at the end of the 2-week period. The foregoing discloses no evidentiary basis to support a finding that Chiclana was discharged for his union activities. The General Counsel contends that, in any event, Pinero's concession that Chiclana's having gone to the Union created "more antagonism" establishes that Chiclana's discharge was based on unlawful discriminatory motivation. I disagree. That statement must be taken in context. In that regard, the testimony of the General Counsel's own witnesses was that Pinero was a high-strung individual who could not brook the slightest challenge to his authority. The General Counsel further adduced evidence that Chiclana stood up to Pinero's attempts to intimidate him and that, in doing so, Chiclana referred to Pinero in vulgar terms. Whether or not he was justified in doing so is not my concern. There is no question but that Pinero was outraged by Chiclana's behavior. Pinero testified that Chiclana, in effect, "bragged" that Pinero could not discharge him. Chiclana's own conduct after his discharge suggests that Pinero's testimony on that point was accurate. In these circumstances, I infer that Pinero's comment that Chiclana's having gone to the Union for aid in retaining his job had created "more antagonism" referred not to discriminatory motivation but simply to Pinero's apparent belief that Chiclana was willfully disobeying him and that Chiclana was flaunting his contempt for Pinero in part because he, Chiclana, was assured of the Union's support. To take the phrase "more antagonism" out of context as clear evidence of unlawful discrimination would require me to ignore all the relevant evidence to the contrary. I find that the evidence is insufficient to establish that Chiclana's termination of employment was discriminatorily motivated.

2. The alleged independent violations of Section 8(a)(1)

The complaint alleges that on June 28, 1979, Pinero as a supervisory employee of Respondent Caribe Hilton had created the impression that the Respondent was engaging in surveillance of the union activities of its musician employees. In support thereof, the General Counsel submitted testimony that, when Chiclana handed him the letter dated June 28, that a union official helped him prepare, Pinero told him that the letter was prepared by a union official he named. If that were the only relevant evidence, there might be merit to the allegation. There is, however, evidence in the record that Pinero had been a vice president of the Union for 2 years and had been a member of its advisory council. Presumably, Chiclana as a long-time union member knew this. In that context, I more easily conclude that Pinero's statement did not create the impression of surveillance of union activities but simply revealed that Pinero was familiar with the respective styles in which Chiclana and the named union official communicated and that Pinero wanted Chiclana to know that he could not claim credit for it. I find no merit in the allegation that the Respondent Caribe Hilton had thereby created the impression that it was engaging in surveillance of union activities.

The General Counsel also asserts that Pinero's remark to Chiclana on July 11, as discussed in detail above, that the fact that Chiclana had gone to the Union for assistance created "more antagonism" independently violated Section 8(a)(1). In context with the surrounding events, as considered above, the statement was not violative of the Act in any way.

There is a separate allegation in the complaint that Pinero's orders to members of the Pijuan sextet at the outset of the strike to refrain from picketing constituted a violation of Section 8(a)(1). Based on the credibility resolutions made, as set out above, I find that that allegation is without merit.

Lastly, the General Counsel contends that the statements by Pinero on two occasions to musician employees of the Caribe Hilton hotel that they were not to pay "taxes" to the Union were violative of Section 8(a)(1). I

credited the General Counsel's witnesses as to only the second occasion, in June 1979.

I have also found above that the musicians in this case, including Pinero are employees of the Class AA hotels. I now further find that Pinero was a supervisor of the Respondent Caribe Hilton, as defined in Section 2(11) of the Act. Specifically, the evidence demonstrates that Pinero held the title of musical director of the Caribe Hilton hotel as given him by the hotel's manager at a cocktail party held to announce the event, that in his duties at the hotel he received communications in writing from the hotel's food and beverage manager on "inter-office" memorandum which pertained to the supervison of the musician emoloyees, that he collected and transmitted to the hotel's payroll section various records needed to compute the paychecks of the respective musicians, that he distributed to individual musicians paychecks drawn by the hotel to the order of each musician, that he responsibly directed the musicians in his group in the interest of the hotel's goal to offer food, beverages, dancing, atmosphere, and service to its clientel and that he possessed and exercised the authority to hire and discharge musicians performing with the Pijuan sextet at the Club Caribe in the hotel. It is apparent that Pinero meets at least one of the statutory criteria set out in Section 2(11) and thus is a supervisor as so defined.

I thus conclude that the Respondent Caribe Hilton violated Section 8(a)(1) when Pinero told the musicians in June 1979 not to pay their "taxes" to the Union. I find no merit as to thc allegation that he had made substantially the same comment in April 1979 as there is no credible evidence thereon.

CONCLUSIONS OF LAW

1. Puerto Rico Hotel Association, Hilton International Company d/b/a Caribe Hilton Hotel, Hilton International Company d/b/a La Concha Hotel-Condado Beach Hotel, Condado Holiday Inn, San Juan Hotel Corporation d/b/a El San Juan Hotel and El Conquistador Hotel, and the Puerto Rico Hotel Corporation d/b/a The Palace Hotel, are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Federacion de Musicos de Puerto Rico, Local 468, American Federation of Musicians, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All musicians employed by Class AA hotels excluding travelers, independent contractors, all other employees, leaders and all other supervisors as defined in the Act, comprise a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times material herein, the above-named labor organization has been and is now the exclusive representative of the employees employed in the unit described above in paragraph 3 for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By having refused, since on or about January 8, 1979 to bargain collectively with the above-named labor organization in that it insisted, as a threshold issue in bargaining, that this labor organization admit that the employees in the unit it represents are not employees of the Class AA hotels and in connection therewith by insisting that the labor organization withdraw unfair labor practice charges it had filed which asserted that the unit employees are employees of these hotels, the Respondent Puerto Rico Hotel Association has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. The Respondent Puerto Rico Hotel Association and the following Respondents whom it represents for purposes of collective bargaining: Hilton International Company d/b/a Caribe Hilton Hotel, Condado Holiday Inn, San Juan Hotel Corporation d/b/a El San Juan Hotel and El Conquisdator Hotel, and The Puerto Rico Hotel Corporation d/b/a The Palace Hotel have, since on or about June 18, 1979, refused and are refusing to bargain collectively with the above-named labor organization by promoting the use of and using personal service contracts with leaders of musical groups of employees of Class AA hotels in Puerto Rico in furtherance of its unlawful disclaimer that the said musicians employees are employees of the Class AA hotels.

7. The Respondents San Juan Hotel Corporation d/b/a El San Juan Hotel and El Conquistador Hotel, and the Puerto Rico Hotel Corporation d/b/a The Palace Hotel have refused and continue to refuse since on or about November 27, 1978, to bargain collectively in that they have stated then they no longer recognize the Union as the bargaining agent of their musician employees and also sought to withdraw the authority they issued to the Respondent Puerto Rico Hotel Association to negotiate a renewal contract with the above-named organization vis-a-vis the unit of employees described above in paragraph 3 despite the fact that, at that time, the renewal contract negotiations were substantially underway and in that the said Respondents have failed and refused and are failing and refusing to honor the collective-bargaining agreement reached on about April 30, 1979, between the said labor organization with the Respondent Puerto Rico Hotel Association notwithstanding that said Respondents have reached agreement with the said labor organization as to the minimum number of musicians to be employed by them and the said Respondents by the foregoing conduct have engaged in and are engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

8. The Respondent Puerto Rico Hotel Associaton did not, in violation of the Act, unilaterally change the agreed-upon recognition clause of its current agreement with the above-named labor organization.

9. The Respondent Hilton International Company, d/b/a Caribe Hilton Hotel, did not, in violation of the Act, (a) discharge its employee Pedro Chiclana because of his activities on behalf of the above-named labor organization, (b) create the impression that it engaged in the surveillance of activities of employees on behalf of that labor organization, (c) impliedly warn employees against supporting that labor organization, (d) direct its musician employees not to strike or picket, (e) instruct its musicians in April 1979 not to pay working dues to the

Union but it has interfered with, restrained, and coerced its emoloyees with respect to their rights under Section 7 of the Act by having, through its supervisor, Juan Pinero, instructed its musician employees in June 1979 that they are not to pay working dues to the said labor organization and thus the Respondent thereby violated Section 8(a)(1) of the Act.

10. The Respondents Puerto Rico Hotel Association, San Juan Hotel Corporation d/b/a El San Juan Hotel and El Conquistador, The Puerto Hotel Corporation d/b/a The Palace Hotel, Hilton International Company d/b/a Caribe Hilton Hotel, and Condado Holiday Inn, did not in violation of Section 8(a)(1) or (5) of the Act unilaterally change the terms and conditions of employment of its musician cmployees by promoting the use of, or by using, personal service contracts with their respective supervisors.

11. By the refusals to bargain collectively with the Union as set out above in paragraph 5, 6, and 7, the Respondents named therein have interfered with, restrained, and coerced and are interfering with, restraining, and coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act and thereby have engaged in and are engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

12. The activities of each Respondent set forth above, occurring in connection with its operations also described above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and the Commonwealth of Puerto Rico and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

THE REMEDY

Having found that the Respondents have engaged in and are engaging in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act, I find it necessary to order that they cease and desist therefrom and to take certain affirmative action in order to effectuate the policies of the Act. Those Respondent hotels found to have separately violated the Act will be ordered to post the notice to be signed by the Association in addition to the notices remedying the violations they committed as the areas found to be violative are overlapping. Those Class AA hotels not otherwise involved will not be ordered to post notices as copies of the Association's notice will be sent to the Union's office where all employees in the unit will have the opportunity to read it.

Upon the foregoing findings of fact and conclusions of law, upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[26]

I. Respondent Puerto Rico Hotel Association, herein called the Association, San Juan, Puerto Rico, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Federacion de Musicos de Puerto Rico, Local 468, American Federation of Musicians, AFL-CIO, by insisting that the officials of the Union state or acknowledge in writing that musicians employed by the Class AA hotels in Puerto Rico are not employees of those hotels entitled to the rights guaranteed them under Section 7 of the Act or by requiring the Union to withdraw unfair labor practice charges it filed to protect those rights.

(b) Refusing to bargain collectively with the Union by promoting the use of personal service contracts by Class AA hotels whereby hotel supervisors who lead and direct musician employees purport to be the employers of those musicians in derogation of the Union's status as exclusive collective-bargaining representatives of those employees.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Post at its principal office copies of the attached notice marked "Appendix A."[27] Copies of this notice, on forms to be provided by the Regional Director for Region 24, after being signed by a duly authorized representative of the Association, shall be conspicuously posted immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter, in all places where notices to all employees are customarily posted.

(b) Return to the Regional Director as many additional copies of Appendix A, signed as indicated above, in order to allow for the further posting of those signed notices on the premises of those of the other Respondents in this case, as provided for below and to allow also for the Regional Director to forward to the Union three signed copies for posting at the Union's premises if it chooses to do so.

(c) Notify the Regional Director, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

II. Respondent San Juan Hotel Corporation d/b/a El San Juan Hotel and El Conquistador Hotel and Respondent The Puerto Rico Hotel Corporation d/b/a The Palace Hotel, San Juan, Puerto Rico, their officers, agents, successors, and assigns, herein jointly called San Juan *et al.*, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with the Union by withdrawing recognition from it as the exclusive representative of a multiemployer unit consisting of, among others, musicians in the employ of those three hotels and by attempting to withdraw from Respondent Association

[26] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[27] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

the authority to negotiate a renewal contract with the Union covering, *inter alia*, musicians employed by Respondent San Juan, *et al.* after the Union has submitted its bargaining demands for that contract renewal.

(b) Refusing to bargain collectively with the Union by using personal service contracts with its leaders who supervise its musician employees which purport to identify those leaders as the employers of the musicians in derogation of the Union's status as the exclusive bargaining representative of those musician employees.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Upon request by the Union, sign the collective-bargaining agreement reached between the Association and the Union on about April 30, 1979.

(b) Post the attached notice marked "Appendix B"[28] on the premises of the El San Juan, El Conquistador, and The Palace Hotels. Copies of this notice, on forms to be provided by the Regional Director for Region 24, after being duly signed by an authorized representative or representatives for Respondent El San Juan *et al.*, shall be conspicuously posted immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in all places at these three hotels where notices to employees are customarily posted. Post also signed copies of Appendix A at these same locations and under the same conditions, immediately upon receiving such copies from the Regional Director for Region 24.

(c) Notify the Regional Director, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

III. Respondent Hilton International Company, d/b/a Caribe Hilton Hotel, San Juan, Puerto Rico, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Using personal service contract forms in employing or in retaining musicians in its employ and whereby its supervisors who lead those musicians are purported to be the employers of those employees, in derogation of the Union's status as their exclusive bargaining representative.

(b) Directing its musician employees not to pay working dues to the Union.

(c) In any like or related manner interfering with, restraining, or coercing its employees respecting the exercise of the rights guaranteed them under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the purposes of the Act:

(a) Post the attached notice marked "Appendix C"[29] on its premises. Copies of this notice, on forms to be provided by the Regional Director for Region 24, after being duly signed by an authorized representative, shall be conspicuously posted immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter, at all places where notices to its employees are customarily posted. Post also signed copies of Appendix A at these same locations and under the same conditions immediately upon receiving such copies from the Regional Director for Region 24.

(b) Notify the Regional Director, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

IV. Respondent Condado Holiday Inn, San Juan, Puerto Rico, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Using personal service contract forms in employing or retaining musicians in its employ and whereby its supervisors who lead musicians are purported to be the employers of those employees, in derogation of the Union's status as their exclusive bargaining representative.

(b) In any like or related manner interfering with, restraining, or coercing its employees respecting the exercise of the rights guaranteed them under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the purposes of the Act:

(a) Post the attached notice marked "Appendix D"[30] on its premises. Copies of the notice, on forms provided by the Regional Director for Region 24, after being duly signed by an authorized representative, shall be conspicuously posted immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter, at all places where notices to employees are customarily posted. Post also signed copies of Appendix A at these same locations and under the same conditions immediately upon receiving signed copies of that notice from the Regional Director.

(b) Notify the Regional Director what steps have been taken to comply herewith.

IT IS RECOMMENDED that the allegations of the complaint as amended that Respondent Caribe Hilton violated Section 8(a)(1) and (3) of the Act by reason of the discharge of Pedro Chiclana be, and they hereby are, dismissed, as are the alleged independent violations of Section 8(a)(1) found above to be without merit.

IT IS ALSO RECOMMENDED that the allegation that Respondent Association, in violation of Section 8(a)(1) and (5) of the Act, reneged upon the agreement reached with the Union by inserting letters AFM in the recognition clause of that agreement in an attempt to limit its application to members of the Union only, or as a unilateral act, is dismissed.

IT IS ALSO RECOMMENDED that the allegation that Respondent Association unilaterally changed working conditions of its musician employees in violation of Section 8(a)(5) of the Act by executing personal service contracts with its supervisors is dismissed.

[28] See fn. 27, *supra*.
[29] See fn. 27, *supra*.
[30] See fn. 27, *supra*.

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT require Federacion de Musicos de Puerto Rico, Local 468, American Federation of Musicians, AFL-CIO, to state, in writing or otherwise, that steady engagement musicians employed by Class AA hotels in the Commonwealth of Puerto Rico are not employees entitled to the rights guaranteed under Section 7 of the National Labor Relations Act, as amended.

WE WILL NOT promote the use of personal service contract forms whereby these hotels purport to treat their musician employees as employees of their leaders as it has been found by the National Labor Relations Board that these musicians are employees of those hotels.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce these musician employees in the exercise of the rights guaranteed them by Section 7 of the Act.

PUERTO RICO HOTEL ASSOCIATION

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively with Federation de Musicos de Puerto Rico, Local 468, American Federation of Musicians, AFL-CIO, by withdrawing recognition from it as the exclusive representative for purposes of collective bargaining of the musicians who are our employees or by attempting to withdraw during negotiations from the multiemployer bargaining unit in which we are represented by the Puerto Rico Hotel Association.

WE WILL NOT use personal service contract forms whereby our musician employees are purported not to be our employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our musician employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act, as amended.

WE WILL, upon request by the above-named Union, sign the collective-bargaining agreements agreed upon between the Union and the Association and effective as of April 20, 1979.

SAN JUAN HOTEL CORPORATION, D/B/A EL SAN JUAN HOTEL AND EL CONQUISTADOR HOTEL; THE PUERTO RICO HOTEL CORPORATION D/B/A THE PALACE HOTEL

APPENDIX C

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT use personal service contract forms in which our musician employees are purported to be employees of their leaders and not our employees.

WE WILL NOT direct our musician employees to refrain from paying their working dues to Federacion de Musicos de Puerto Rico, Local 468, American Federation of Musicians, AFL-CIO.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our musician employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act, as amended.

HILTON INTERNATIONAL COMPANY D/B/A CARIBE HILTON HOTEL

APPENDIX D

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT use personal service contract forms in which our musician employees are purported to be employees of their leaders and not our employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our musician employees in the exercise of the rights guaranteed them in Section 7 of the National Labor Relations Act, as amended.

CONDADO HOLIDAY INN